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THREATENED AND ENDANGERED SPECIES RECOVERY ACT OF 2005

SEPTEMBER 27, 2005.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. POMBO, from the Committee on Resources, submitted the following

R E P O R T

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 3824]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 3824) to amend and reauthorize the Endangered Species Act of 1973 to provide greater results conserving and recovering listed species, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Threatened and Endangered Species Recovery Act of 2005".

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

Sec. 1. Short title; table of contents.
Sec. 2. Amendment references.
Sec. 3. Definitions.
Sec. 4. Determinations of endangered species and threatened species.
Sec. 5. Repeal of critical habitat requirements.
Sec. 6. Petitions and procedures for determinations and revisions.
Sec. 7. Reviews of listings and determinations.
Sec. 8. Secretarial guidelines; State comments.
Sec. 9. Recovery plans and land acquisitions.
Sec. 10. Cooperation with States and Indian tribes.
Sec. 11. Interagency cooperation and consultation.
Sec. 12. Exceptions to prohibitions.
Sec. 13. Private property conservation.
Sec. 14. Public accessibility and accountability.
Sec. 15. Annual cost analyses.

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Sec. 16. Reimbursement for depredation of livestock by reintroduced species.
Sec. 17. Authorization of appropriations.
Sec. 18. Miscellaneous technical corrections.
Sec. 19. Clerical amendment to table of contents.
Sec. 20. Certain actions deemed in compliance.

SEC. 2. AMENDMENT REFERENCES.

Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to such section or other provision of the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

SEC. 3. DEFINITIONS.

(a) BEST AVAILABLE SCIENTIFIC DATA.—Section 3 (16 U.S.C. 1532) is amended by redesignating paragraphs (2) through (21) in order as paragraphs (3), (4), (5), (6), (7), (8), (9), (10), (11), (13), (14), (15), (16), (17), (18), (19), (20), (21), and (22), respectively, and by inserting before paragraph (3), as so redesignated, the following:

"(2)(A) The term 'best available scientific data' means scientific data, regardless of source, that are available to the Secretary at the time of a decision or action for which such data are required by this Act and that the Secretary determines are the most accurate, reliable, and relevant for use in that decision or action.

"(B) Not later than one year after the date of the enactment of the Threatened and Endangered Species Recovery Act of 2005, the Secretary shall issue regulations that establish criteria that must be met to determine which data constitute the best available scientific data for purposes of subparagraph (A).

"(C) If the Secretary determines that data for a decision or action do not comply with the criteria established by the regulations issued under subparagraph (B), do not comply with guidance issued under section 515 of the Treasury and General Government Appropriations Act, 2001 (Public Law 106–554; 114 Stat. 2763A–171) by the Director of the Office of Management and Budget and the Secretary, do not consist of any empirical data, or are found in sources that have not been subject to peer review in a generally acceptable manner—

"(i) the Secretary shall undertake the necessary measures to assure compliance with such criteria or guidance; and

"(ii) the Secretary may—

"(I) secure such empirical data;

"(II) seek appropriate peer review; and

"(III) reconsider the decision or action based on any supplemental or different data provided or any peer review conducted pursuant to this subparagraph.".

(b) PERMIT OR LICENSE APPLICANT.—Section 3 (16 U.S.C. 1532) is further amended by amending paragraph (13), as so redesignated, to read as follows:

"(13) The term 'permit or license applicant' means, when used with respect to an action of a Federal agency that is subject to section 7(a) or (b), any person that has applied to such agency for a permit or license or for formal legal approval to perform an act.".

(c) JEOPARDIZE THE CONTINUED EXISTENCE.—Section 3 (16 U.S.C. 1532) is further amended by inserting after paragraph (11) the following:

"(12) The term 'jeopardize the continued existence' means, with respect to an agency action (as that term is defined in section 7(a)(2)), that the action reasonably would be expected to significantly impede, directly or indirectly, the conservation in the long-term of the species in the wild.".

(d) CONFORMING AMENDMENT.—Section 7(n) (16 U.S.C. 1536(n)) is amended by striking "section 3(13)" and inserting "section 3(14)".

SEC. 4. DETERMINATIONS OF ENDANGERED SPECIES AND THREATENED SPECIES.

(a) REQUIREMENT TO MAKE DETERMINATIONS.—Section 4 (16 U.S.C. 1533) is amended by striking so much as precedes subsection (a)(3) and inserting the following:

"DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

"SEC. 4. (a) IN 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 by human activities, competition from other species, drought, fire, or other catastrophic natural causes.

"(B) Overutilization for commercial, recreational, scientific, or educational purposes.

"(C) Disease or predation.

"(D) The inadequacy of existing regulatory mechanisms, including any efforts identified pursuant to subsection (b)(1).

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

"(2) The Secretary shall use the authority provided by paragraph (1) to determine any distinct population of any species of vertebrate fish or wildlife to be an endangered species or a threatened species only sparingly.".

(b) BASIS FOR DETERMINATION.—Section 4(b)(1)(A) (16 U.S.C. 1533(b)(1)(A)) is amended—

(1) by striking "best scientific and commercial data available to him" and inserting "best available scientific data"; and

(2) by inserting "Federal agency, any" after "being made by any".

(c) LISTS.—Section 4(c)(2) (16 U.S.C. 1533(c)(2)) is amended to read as follows:

"(2)(A) The Secretary shall—

"(i) conduct, at least once every 5 years, based on the information collected for the biennial reports to the Congress required by paragraph (3) of subsection (f), a review of all species included in a list that is published pursuant to paragraph (1) and that is in effect at the time of such review; and

"(ii) determine on the basis of such review and any other information the Secretary considers relevant 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.

"(B) Each determination under subparagraph (A)(ii) shall be made in accordance with subsections (a) and (b).".

SEC. 5. REPEAL OF CRITICAL HABITAT REQUIREMENTS.

(a) REPEAL OF REQUIREMENT.—Section 4(a) (16 U.S.C. 1533(a)) is amended by striking paragraph (3).

(b) CONFORMING AMENDMENTS.—

(1) Section 3 (16 U.S.C. 1532), as amended by section 3 of this Act, is further amended by striking paragraph (6) and by redesignating paragraphs (7) through (22) in order as paragraphs (6) through (21).

(2) Section 4(b) (16 U.S.C. 1533(b)), as otherwise amended by this Act, is further amended by striking paragraph (2), and by redesignating paragraphs (3) through (8) in order as paragraphs (2) through (7), respectively.

(3) Section 4(b) (16 U.S.C. 1533(b)) is further amended in paragraph (2), as redesignated by paragraph (2) of this subsection, by striking subparagraph (D).

(4) Section 4(b) (16 U.S.C. 1533(b)) is further amended in paragraph (4), as redesignated by paragraph (2) of this subsection, by striking "determination, designation, or revision referred to in subsection (a)(1) or (3)" and inserting "determination referred to in subsection (a)(1)".

(5) Section 4(b) (16 U.S.C. 1533(b)) is further amended in paragraph (7), as redesignated by paragraph (2) of this subsection, by striking "; and if such regulation" and all that follows through the end of the sentence and inserting a period.

(6) Section 4(c)(1) (16 U.S.C. 1533(c)(1)) is amended—

(A) in the second sentence—

(i) by inserting "and" after "if any"; and

(ii) by striking ", and specify any" and all that follows through the end of the sentence and inserting a period; and

(B) in the third sentence by striking ", designations,".

(7) Section 5 (16 U.S.C. 1534), as amended by section 9(a)(3) of this Act, is further amended in subsection (j)(2) by striking "section 4(b)(7)" and inserting "section 4(b)(6)".

(8) Section 6(c) (16 U.S.C. 1535(c)), as amended by section 10(1) of this Act, is further amended in paragraph (3) by striking "section 4(b)(3)(B)(iii)" each place it appears and inserting "section 4(b)(2)(B)(iii)".

(9) Section 7 (16 U.S.C. 1536) is amended—

(A) in subsection (a)(2) in the first sentence by striking "or result in the destruction or adverse modification of any habitat of such species" and all that follows through the end of the sentence and inserting a period;

(B) in subsection (a)(4) in the first sentence by striking "or result" and all that follows through the end of the sentence and inserting a period; and

(C) in subsection (b)(3)(A) by striking "or its critical habitat".

(10) Section 10(j)(2)(C)) (16 U.S.C. 1539(j)(2)(C)), as amended by section 12(c) of this Act, is further amended—

(A) by striking "that—" and all that follows through "(i) solely" and inserting "that solely"; and

(B) by striking "; and" and all that follows through the end of the sentence and inserting a period.

SEC. 6. PETITIONS AND PROCEDURES FOR DETERMINATIONS AND REVISIONS.

(a) TREATMENT OF PETITIONS.—Section 4(b) (16 U.S.C. 1533(b)) is amended in paragraph (2), as redesignated by section 5(b)(2) of this Act, by adding at the end of subparagraph (A) the following: "The Secretary shall not make a finding that the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted unless the petitioner provides to the Secretary a copy of all information cited in the petition.".

(b) IMPLEMENTING REGULATIONS.—

(1) PROPOSED REGULATIONS.—Section 4(b) (16 U.S.C. 1533(b)) is amended—

(A) in paragraph (4)(A), as redesignated by section 5(b)(2) of this Act—

(i) in clause (i) by striking ", and" and inserting a semicolon;

(ii) in clause (ii) by striking "to the State agency in" and inserting "to the Governor of, and the State agency in,";

(iii) in clause (ii) by striking "such agency" and inserting "such Governor or agency";

(iv) in clause (ii) by inserting "and" after the semicolon at the end; and

(v) by adding at the end the following:

"(iii) maintain, and shall make available, a complete record of all information concerning the determination or revision in the possession of the Secretary, on a publicly accessible website on the Internet, including an index to such information."; and

(B) by adding at the end the following:

"(8)(A) Information maintained and made available under paragraph (5)(A)(iii) shall include any status review, all information cited in such a status review, all information referred to in the proposed regulation and the preamble to the proposed regulation, and all information submitted to the Secretary by third parties.

"(B) The Secretary shall withhold from public review under paragraph (5)(A)(iii) any information that may be withheld under 552 of title 5, United States Code.".

(2) FINAL REGULATIONS.—Paragraph (5) of section 4(b) (16 U.S.C. 1533(b)), as amended by section 5(b)(2) of this Act, is further amended—

(A) in subparagraph (A) by striking clauses (i) and (ii) and inserting the following:

"(i) a final regulation to implement such a determination of whether a species is an endangered species or a threatened species;

"(ii) notice that such 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 such withdrawal is based.";

(B) in subparagraph (B)(i) by striking "subparagraph (A)(i)" and inserting "subparagraph (A)";

(C) in subparagraph (B)(ii) by striking "subparagraph (A)(i)" and inserting "subparagraph (A)"; and

(D) by striking subparagraph (C).

(3) EMERGENCY DETERMINATIONS.—Paragraph (6) of section 4(b) (16 U.S.C. 1533(b)), as redesignated by section 5(b)(2) of this Act, is further amended—

(A) in the matter preceding subparagraph (A), by inserting "with respect to a determination of a species to be an endangered species or a threatened species" after "any regulation"; and

(B) in subparagraph (B), by striking "the State agency in" and inserting "the Governor of, and State agency in,".

SEC. 7. REVIEWS OF LISTINGS AND DETERMINATIONS.

Section 4(c) (16 U.S.C. 1533(c)) is amended by inserting at the end the following:

"(3) Each determination under paragraph (2)(B) shall consider one of the following:

"(A) Except as provided in subparagraph (B) of this paragraph, the criteria in the recovery plan for the species required by section 5(c)(1)(A) or (B).

"(B) If the recovery plan is issued before the criteria required under section 5(c)(1)(A) and (B) are established or if no recovery plan exists for the species, the factors for determination that a species is an endangered species or a threatened species set forth in subsections (a)(1) and (b)(1).

"(C) A finding of fundamental error in the determination that the species is an endangered species, a threatened species, or extinct.

"(D) A determination that the species is no longer an endangered species or threatened species or in danger of extinction, based on an analysis of the factors that are the basis for listing under section 4(a)(1).".

SEC. 8. SECRETARIAL GUIDELINES; STATE COMMENTS.

Section 4 (16 U.S.C. 1533) is amended—

(1) by striking subsections (f) and (g) and redesignating subsections (h) and (i) as subsections (f) and (g), respectively;

(2) in subsection (f), as redesignated by paragraph (1) of this subsection—

(A) in the heading by striking "AGENCY" and inserting "SECRETARIAL";

(B) in the matter preceding paragraph (1), by striking "the purposes of this section are achieved" and inserting "this section is implemented";

(C) by redesignating paragraph (4) as paragraph (5);

(D) in paragraph (3) by striking "and" after the semicolon at the end, and by inserting after paragraph (3) the following:

"(4) the criteria for determining best available scientific data pursuant to section 3(2); and"; and

(E) in paragraph (5), as redesignated by subparagraph (C) of this paragraph, by striking "subsection (f) of this section" and inserting "section 5";

(3) in subsection (g), as redesignated by paragraph (1) of this section—

(A) by inserting "COMMENTS.—" before the first sentence;

(B) by striking "a State agency" the first place it appears and inserting "a Governor, State agency, county (or equivalent jurisdiction), or unit of local government";

(C) by striking "a State agency" the second place it appears and inserting "a Governor, State agency, county (or equivalent jurisdiction), or unit of local government";

(D) by striking "the State agency" and inserting "the Governor, State agency, county (or equivalent jurisdiction), or unit of local government, respectively"; and

(E) by striking "agency's".

SEC. 9. RECOVERY PLANS AND LAND ACQUISITIONS.

(a) IN GENERAL.—Section 5 (16 U.S.C. 1534) is amended—

(1) by redesignating subsections (a) and (b) as subsections (k) and (l), respectively;

(2) in subsection (l), as redesignated by paragraph (1) of this section, by striking "subsection (a) of this section" and inserting "subsection (k)"; and

(3) by striking so much as precedes subsection (k), as redesignated by paragraph (1) of this section, and inserting the following:

"RECOVERY PLANS AND LAND ACQUISITION

"SEC. 5. (a) RECOVERY PLANS.—The Secretary shall, in accordance with this section, develop and implement a plan (in this subsection referred to as a 'recovery plan') for the species determined under section 4(a)(1) to be an endangered species or a threatened species, unless the Secretary finds that such a plan will not promote the conservation and survival of the species.

"(b) DEVELOPMENT OF RECOVERY PLANS.—(1) Subject to paragraphs (2) and (3), the Secretary, in developing recovery plans, shall, to the maximum extent practicable, 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.

"(2) In the case of any species determined to be an endangered species or threatened species after the date of the enactment of the Threatened and Endangered Species Recovery Act of 2005, the Secretary shall publish a final recovery plan for a species within 2 years after the date the species is listed under section 4(c).

"(3)(A) For those species that are listed under section 4(c) on the date of enactment of the Threatened and Endangered Species Recovery Act of 2005 and are described in subparagraph (B) of this paragraph, the Secretary, after providing for public notice and comment, shall—

"(i) not later than 1 year after such date, publish in the Federal Register a priority ranking system for preparing or revising such recovery plans that is consistent with paragraph (1) and takes into consideration the scientifically based needs of the species; and

"(ii) not later than 18 months after such date, publish in the Federal Register a list of such species ranked in accordance with the priority ranking system

published under clause (i) for which such recovery plans will be developed or revised, and a tentative schedule for such development or revision.

"(B) A species is described in this subparagraph if—

"(i) a recovery plan for the species is not published under this Act before the date of enactment of the Threatened and Endangered Species Recovery Act of 2005 and the Secretary finds such a plan would promote the conservation and survival of the species; or

"(ii) a recovery plan for the species is published under this Act before such date of enactment and the Secretary finds revision of such plan is warranted.

"(C)(i) The Secretary shall, to the maximum extent practicable, adhere to the list and tentative schedule published under subparagraph (A)(ii) in developing or revising recovery plans pursuant to this paragraph.

"(ii) The Secretary shall provide the reasons for any deviation from the list and tentative schedule published under subparagraph (A)(ii), in each report to the Congress under subsection (e).

"(4) The Secretary, using the priority ranking system required under paragraph (3), shall prepare or revise such plans within 10 years after the date of the enactment of the Threatened and Endangered Species Recovery Act of 2005.

"(c) PLAN CONTENTS.—(1)(A) Except as provided in subparagraph (E), a recovery plan shall be based on the best available scientific data and shall include the following:

"(i) Objective, measurable criteria that, when met, would result in a determination, in accordance with this section, that the species to which the recovery plan applies be removed from the lists published under section 4(c) or be reclassified from an endangered species to a threatened species.

"(ii) A description of such site-specific or other measures that would achieve the criteria established under clause (i), including such intermediate measures as are warranted to effect progress toward achievement of the criteria.

"(iii) Estimates of the time required and the costs to carry out those measures described under clause (ii), including, to the extent practicable, estimated costs for any recommendations, by the recovery team, or by the Secretary if no recovery team is selected, that any of the areas identified under clause (iv) be acquired on a willing seller basis.

"(iv) An identification of those specific areas that are of special value to the conservation of the species.

"(B) Those members of any recovery team appointed pursuant to subsection (d) with relevant scientific expertise, or the Secretary if no recovery team is appointed, shall, based solely on the best available scientific data, establish the objective, measurable criteria required under subparagraph (A)(i).

"(C)(i) If the recovery team, or the Secretary if no recovery team is appointed, determines in the recovery plan that insufficient best available scientific data exist to determine criteria or measures under subparagraph (A) that could achieve a determination to remove the species from the lists published under section 4(c), the recovery plan shall contain interim criteria and measures that are likely to improve the status of the species.

"(ii) If a recovery plan does not contain the criteria and measures provided for by clause (i) of subparagraph (A), the recovery team for the plan, or by the Secretary if no recovery team is appointed, shall review the plan at intervals of no greater than 5 years and determine if the plan can be revised to contain the criteria and measures required under subparagraph (A).

"(iii) If the recovery team or the Secretary, respectively, determines under clause (ii) that a recovery plan can be revised to add the criteria and measures provided for under subparagraph (A), the recovery team or the Secretary, as applicable, shall revise the recovery plan to add such criteria and measures within 2 years after the date of the determination.

"(D) In specifying measures in a recovery plan under subparagraph (A), a recovery team or the Secretary, as applicable, shall—

"(i) whenever possible include alternative measures; and

"(ii) in developing such alternative measures, the Secretary shall seek to identify, among such alternative measures of comparable expected efficacy, the alternative measures that are least costly.

"(E) Estimates of time and costs pursuant to subparagraph (A)(iii), and identification of the least costly alternatives pursuant to subparagraph (D)(ii), are not required to be based on the best available scientific data.

"(2) Any area that, immediately before the enactment of the Threatened and Endangered Species Recovery Act of 2005, is designated as critical habitat of an endangered species or threatened species shall be treated as an area described in subparagraph (A)(iv) until a recovery plan for the species is developed or the existing recovery plan for the species is revised pursuant to subsection (b)(3).

"(d) RECOVERY TEAMS.—(1) The Secretary shall promulgate regulations that provide for the establishment of recovery teams for development of recovery plans under this section.

"(2) Such regulations shall—

"(A) establish criteria and the process for selecting the members of recovery teams, and the process for preparing recovery plans, that ensure that each team—

"(i) is of a size and composition to enable timely completion of the recovery plan; and

"(ii) includes sufficient representation from constituencies with a demonstrated direct interest in the species and its conservation or in the economic and social impacts of its conservation to ensure that the views of such constituencies will be considered in the development of the plan;

"(B) include provisions regarding operating procedures of and recordkeeping by recovery teams;

"(C) ensure that recovery plans are scientifically rigorous and that the evaluation of costs required by paragraphs (1)(A)(iii) and (1)(D) of subsection (c) are economically rigorous; and

"(D) provide guidelines for circumstances in which the Secretary may determine that appointment of a recovery team is not necessary or advisable to develop a recovery plan for a specific species, including procedures to solicit public comment on any such determination.

"(3) The Federal Advisory Committee Act (5 App. U.S.C.) shall not apply to recovery teams appointed in accordance with regulations issued by the Secretary under this subsection.

"(e) REPORTS TO CONGRESS.—(1) The Secretary shall report every two years to the Committee on Resources of the House of Representatives and the Committee on Environment and Public Works of the Senate on the status of all domestic endangered species and threatened species and the status of efforts to develop and implement recovery plans for all domestic endangered species and threatened species.

"(2) In reporting on the status of such species since the time of its listing, the Secretary shall include—

"(A) an assessment of any significant change in the well-being of each such species, including—

"(i) changes in population, range, or threats; and

"(ii) the basis for that assessment; and

"(B) for each species, a measurement of the degree of confidence in the reported status of such species, based upon a quantifiable parameter developed for such purposes.

"(f) PUBLIC NOTICE AND COMMENT.—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.

"(g) STATE COMMENT.—The Secretary shall, prior to final approval of a new or revised recovery plan, provide a draft of such plan and an opportunity to comment on such draft to the Governor of, and State agency in, any State to which such draft would apply. The Secretary shall include in the final recovery plan the Secretary's response to the comments of the Governor and the State agency.

"(h) CONSULTATION TO ENSURE CONSISTENCY WITH DEVELOPMENT PLAN.—(1) The Secretary shall, prior to final approval of a new or revised recovery plan, consult with any pertinent State, Indian tribe, or regional or local land use agency or its designee.

"(2) For purposes of this Act, the term 'Indian tribe' means—

"(A) with respect to the 48 contiguous States, any federally recognized Indian tribe, organized band, pueblo, or community; and

"(B) with respect to Alaska, the Metlakatla Indian Community.

"(i) USE OF PLANS.—(1) Each Federal agency shall consider any relevant best available scientific data contained in a recovery plan in any analysis conducted under section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

"(2)(A)(i) The head of any Federal agency may enter into an agreement with the Secretary specifying the measures the agency will carry out to implement a recovery plan.

"(ii) Each such agreement shall be published in draft form with notice and an opportunity for public comment.

"(iii) Each such final agreement shall be published, with responses by the head of the Federal agency to any public comments submitted on the draft agreement.

"(B) Nothing in a recovery plan shall be construed to establish regulatory requirements.

"(j) 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 that have recovered to the point at which the measures provided pursuant to this Act are no longer necessary and that, in accordance with this section, have been removed from the lists published under section 4(c).

"(2) The Secretary shall make prompt use of the authority under section 4(b)(7) to prevent a significant risk to the well-being of any such recovered species.".

(b) RECOVERY PLANS FOR SPECIES OCCUPYING MORE THAN ONE STATE.—Section 6 (16 U.S.C. 1535) is amended by adding at the end the following:

"(j) RECOVERY PLANS FOR SPECIES OCCUPYING MORE THAN ONE STATE.—Any recovery plan under section 5 for an endangered species or a threatened species that occupies more than one State shall identify criteria and actions pursuant to subsection (c)(1) of section 5 for each State that are necessary so that the State may pursue a determination that the portion of the species found in that State may be removed from lists published under section 4(c).".

(c) THREATENED AND ENDANGERED SPECIES INCENTIVES PROGRAM.—

(1) AGREEMENTS AUTHORIZED.—Section 5 (16 U.S.C. 1534) is further amended by adding at the end the following:

"(m) THREATENED AND ENDANGERED SPECIES INCENTIVES PROGRAM.—(1) The Secretary may enter into species recovery agreements pursuant to paragraph (2) and species conservation contract agreements pursuant to paragraph (3) with persons, other than agencies or departments of the Federal Government or State governments, under which the Secretary is obligated, subject to the availability of appropriations, to make annual payments or provide other compensation to the persons to implement the agreements.

"(2)(A) The Secretary and persons who own or control the use of private land may enter into species recovery agreements with a term of not less than 5 years that meet the criteria set forth in subparagraph (B) and are in accordance with the priority established in subparagraph (C).

"(B) A species recovery agreement entered into under this paragraph by the Secretary with a person—

"(i) shall require that the person shall carry out, on the land owned or controlled by the person, activities that—

"(I) protect and restore habitat for covered species that are species determined to be endangered species or threatened species pursuant to section 4(a)(1);

"(II) contribute to the conservation of one or more covered species; and

"(III) specify and implement a management plan for the covered species;

"(ii) shall specify such a management plan that includes—

"(I) identification of the covered species;

"(II) a description of the land to which the agreement applies; and

"(III) a description of, and a schedule to carry out, the activities under clause (i);

"(iii) shall provide sufficient documentation to establish ownership or control by the person of the land to which the agreement applies;

"(iv) shall include the amounts of the annual payments or other compensation to be provided by the Secretary to the person under the agreement, and the terms under which such payments or compensation shall be provided; and

"(v) shall include—

"(I) the duties of the person;

"(II) the duties of the Secretary;

"(III) the terms and conditions under which the person and the Secretary mutually agree the agreement may be modified or terminated; and

"(IV) acts or omissions by the person or the Secretary that shall be considered violations of the agreement, and procedures under which notice of and an opportunity to remedy any violation by the person or the Secretary shall be given.

"(C) In entering into species recovery agreements under this paragraph, the Secretary shall accord priority to agreements that apply to any areas that are identified in recovery plans pursuant to subsection (c)(1)(A)(iv).

"(3)(A) The Secretary and persons who own private land may enter into species conservation contract agreements with terms of 30 years, 20 years, or 10 years that meet the criteria set forth in subparagraph (B) and standards set forth in subparagraph (D) and are in accordance with the priorities established in subparagraph (C).

"(B) A species conservation contract agreement entered into under this paragraph by the Secretary with a person—

"(i) shall provide that the person shall, on the land owned by the person—

"(I) carry out conservation practices to meet one or more of the goals set forth in clauses (i) through (iii) of subparagraph (C) for one or more covered

species, that are species that are determined to be endangered species or threatened species pursuant to section 4(a)(1), species determined to be candidate species pursuant to section 4(b)(3)(B)(iii), or species subject to comparable designations under State law; and

"(II) specify and implement a management plan for the covered species;

"(ii) shall specify such a management plan that includes—

"(I) identification of the covered species;

"(II) a description in detail of the conservation practices for the covered species that the person shall undertake;

"(III) a description of the land to which the agreement applies; and

"(IV) a schedule of approximate deadlines, whether one-time or periodic, for undertaking the conservation practices described pursuant to subclause (II);

"(V) a description of existing or future economic activities on the land to which the agreement applies that are compatible with the conservation practices described pursuant to subclause (II) and generally with conservation of the covered species;

"(iii) shall specify the term of the agreement; and

"(iv) shall include—

"(I) the duties of the person;

"(II) the duties of the Secretary;

"(III) the terms and conditions under which the person and the Secretary mutually agree the agreement may be modified or terminated;

"(IV) acts or omissions by the person or the Secretary that shall be considered violations of the agreement, and procedures under which notice of and an opportunity to remedy any violation by the person or the Secretary shall be given; and

"(V) terms and conditions for early termination of the agreement by the person before the management plan is fully implemented or termination of the agreement by the Secretary in the case of a violation by the person that is not remedied under subclause (IV), including any requirement for the person to refund all or part of any payments received under subparagraph (E) and any interest thereon.

"(C) The Secretary shall establish priorities for the selection of species conservation contract agreements, or groups of such agreements for adjacent or proximate lands, to be entered into under this paragraph that address the following factors:

"(i) The potential of the land to which the agreement or agreements apply to contribute significantly to the conservation of an endangered species or threatened species or a species with a comparable designation under State law.

"(ii) The potential of such land to contribute significantly to the improvement of the status of a candidate species or a species with a comparable designation under State law.

"(iii) The amount of acreage of such land.

"(iv) The number of covered species in the agreement or agreements.

"(v) The degree of urgency for the covered species to implement the conservation practices in the management plan or plans under the agreement or agreements.

"(vi) Land in close proximity to military test and training ranges, installations, and associated airspace that is affected by a covered species.

"(D) The Secretary shall enter into a species conservation contract agreement submitted by a person, if the Secretary finds that the person owns such land or has sufficient control over the use of such land to ensure implementation of the management plan under the agreement.

"(E)(i) Upon entering into a species conservation contract agreement with the Secretary pursuant to this paragraph, a person shall receive the financial assistance provided for in this subparagraph.

"(ii) If the person is implementing fully the agreement, the person shall receive from the Secretary—

"(I) in the case of a 30-year agreement, an annual contract payment in an amount equal to 100 percent of the person's actual costs to implement the conservation practices described in the management plan under the terms of the agreement;

"(II) in the case of a 20-year agreement, an annual contract payment in an amount equal to 80 percent of the person's actual costs to implement the conservation practices described in the management plan under the terms of the agreement; and

"(III) in the case of a 10-year agreement, an annual contract payment in an amount equal to 60 percent of the person's actual costs to implement the con-

servation practices described in the management plan under the terms of the agreement.

"(iii)(I) If the person receiving contract payments pursuant to clause (ii) receives any other State or Federal funds to defray the cost of any conservation practice, the cost of such practice shall not be eligible for such contract payments.

"(II) Contributions of agencies or organizations to any conservation practice other than the funds described in subclause (I) shall not be considered as costs of the person for purposes of the contract payments pursuant to clause (iii).

"(4)(A) Upon request of a person seeking to enter into an agreement pursuant to this subsection, the Secretary may provide to such person technical assistance in the preparation, and management training for the implementation, of the management plan for the agreement.

"(B) Any State agency, local government, nonprofit organization, or federally recognized Indian tribe may provide assistance to a person in the preparation of a management plan, or participate in the implementation of a management plan, including identifying and making available certified fisheries or wildlife biologists with expertise in the conservation of species for purposes of the preparation or review and approval of management plans for species conservation contract agreements under paragraph (3)(D)(iii).

"(5) Upon any conveyance or other transfer of interest in land that is subject to an agreement under this subsection—

"(A) the agreement shall terminate if the agreement does not continue in effect under subparagraph (B);

"(B) the agreement shall continue in effect with respect to such land, with the same terms and conditions, if the person to whom the land or interest is conveyed or otherwise transferred notifies the Secretary of the person's election to continue the agreement by no later than 30 days after the date of the conveyance or other transfer and the person is determined by the Secretary to qualify to enter into an agreement under this subsection; or

"(C) the person to whom the land or interest is conveyed or otherwise transferred may seek a new agreement under this subsection.

"(6) An agreement under this subsection may be renewed with the mutual consent of the Secretary and the person who entered into the agreement or to whom the agreement has been transferred under paragraph (5).

"(7) The Secretary shall make annual payments under this subsection as soon as possible after December 31 of each calendar year.

"(8) An agreement under this subsection that applies to an endangered species or threatened species shall, for the purpose of section 10(a)(4), be deemed to be a permit to enhance the propagation or survival of such species under section 10(a)(1), and a person in full compliance with the agreement shall be afforded the protection of section 10(a)(4).

"(9) The Secretary, or any other Federal official, may not require a person to enter into an agreement under this subsection as a term or condition of any right, privilege, or benefit, or of any action or refraining from any action, under this Act.".

(2) Subsection (e)(2) of section 7 (16 U.S.C. 1536) (as redesignated by section 11(d)(2) of this Act) is amended by inserting "or in an agreement under section 5(m)" after "section".

(d) CONFORMING AMENDMENTS.—

(1) Section 6(d)(1) (16 U.S.C. 1535(d)(1)) is amended by striking "section 4(g)" and inserting "section 5(j)".

(2) The Marine Mammal Protection Act of 1972 is amended—

(A) in section 104(c)(4)(A)(ii) (16 U.S.C. 1374(c)(4)(A)(ii)) by striking "section 4(f)" and inserting "section 5"; and

(B) in section 115(b)(2) (16 U.S.C. 1383b(b)(2)) by striking "section 4(f) of the Endangered Species Act of 1973 (16 U.S.C. 1533(f))" and inserting "section 5 of the Endangered Species Act of 1973".

SEC. 10. COOPERATION WITH STATES AND INDIAN TRIBES.

Section 6 (16 U.S.C. 1535) is further amended—

(1) in subsection (c), by adding at the end the following:

"(3)(A) Any cooperative agreement entered into by the Secretary under this subsection may also provide for development of a program for conservation of species determined to be candidate species pursuant to section 4(b)(3)(B)(iii) or any other species that the State and the Secretary agree is at risk of being determined to be an endangered species or threatened species under section 4(a)(1) in that State. Upon completion of consultation on the agreement pursuant to subsection (e)(2), any incidental take statement issued on the agreement shall apply to any such species, and to the State and any landowners enrolled in any program under the agreement, without further consultation (except any additional consultation pursuant to sub-

section (e)(2)) if the species is subsequently determined to be an endangered species or a threatened species and the agreement remains an adequate and active program for the conservation of endangered species and threatened species.

"(B) Any cooperative agreement entered into by the Secretary under this subsection may also provide for monitoring or assistance in monitoring the status of candidate species pursuant to section 4(b)(3)(C)(iii) or recovered species pursuant to section 5(j).

"(C) The Secretary shall periodically review each cooperative agreement under this subsection and seek to make changes the Secretary considers necessary for the conservation of endangered species and threatened species to which the agreement applies.

"(4) Any cooperative agreement entered into by the Secretary under this subsection that provides for the enrollment of private lands or water rights in any program established by the agreement shall ensure that the decision to enroll is voluntary for each owner of such lands or water rights.

"(5)(A) The Secretary may enter into a cooperative agreement under this subsection with an Indian tribe in substantially the same manner in which the Secretary may enter into a cooperative agreement with a State.

"(B) For the purposes of this paragraph, the term 'Indian tribe' means—

"(i) with respect to the 48 contiguous States, any federally recognized Indian tribe, organized band, pueblo, or community; and

"(ii) with respect to Alaska, the Metlakatla Indian Community.";

(2) in subsection (d)(1)—

(A) by striking "pursuant to subsection (c) of this section";

(B) by striking "or to assist" and all that follows through "section 5(j)" and inserting "pursuant to subsection (c)(1) and (2) or to address candidate species or other species at risk and recovered species pursuant to subsection (c)(3)"; and

(C) in subparagraph (F), by striking "monitoring the status of candidate species" and inserting "developing a conservation program for, or monitoring the status of, candidate species or other species determined to be at risk pursuant to subsection (c)(3)"; and

(3) in subsection (e)—

(A) by inserting "(1)" before the first sentence;

(B) in paragraph (1), as designated by subparagraph (A) of this paragraph, by striking "at no greater than annual intervals" and inserting "every 3 years"; and

(C) by adding at the end the following:

"(2) Any cooperative agreement entered into by the Secretary under subsection (c) shall be subject to section 7(a)(2) through (d) and regulations implementing such provisions only before—

"(A) the Secretary enters into the agreement; and

"(B) the Secretary approves any renewal of, or amendment to, the agreement that—

"(i) addresses species that are determined to be endangered species or threatened species, are not addressed in the agreement, and may be affected by the agreement; or

"(ii) new information about any species addressed in the agreement that the Secretary determines—

"(I) constitutes the best available scientific data; and

"(II) indicates that the agreement may have adverse effects on the species that had not been considered previously when the agreement was entered into or during any revision thereof or amendment thereto.

"(3) The Secretary may suspend any cooperative agreement established pursuant to subsection (c), after consultation with the Governor of the affected State, if the Secretary finds during the periodic review required by paragraph (1) of this subsection that the agreement no longer constitutes an adequate and active program for the conservation of endangered species and threatened species.

"(4) The Secretary may terminate any cooperative agreement entered into by the Secretary under subsection (c), after consultation with the Governor of the affected State, if—

"(A) as result of the procedures of section 7(a)(2) through (d) undertaken pursuant to paragraph (2) of this subsection, the Secretary determines that continued implementation of the cooperative agreement is likely to jeopardize the continued existence of endangered species or threatened species, and the cooperative agreement is not amended or revised to incorporate a reasonable and prudent alternative offered by the Secretary pursuant to section 7(b)(3); or

"(B) the cooperative agreement has been suspended under paragraph (3) of this subsection and has not been amended or revised and found by the Sec-

retary to constitute an adequate and active program for the conservation of endangered species and threatened species within 180 days after the date of the suspension.".

SEC. 11. INTERAGENCY COOPERATION AND CONSULTATION.

(a) CONSULTATION REQUIREMENT.—Section 7(a) (16 U.S.C. 1536(a)) is amended—

(1) in paragraph (1) in the second sentence, by striking "endangered species" and all that follows through the end of the sentence and inserting "species determined to be endangered species and threatened species under section 4.";

(2) in paragraph (2)—

(A) in the first sentence by striking "action" the first place it appears and all that follows through "is not" and inserting "agency action authorized, funded, or carried out by such agency is not";

(B) in the first sentence by striking ", unless" and all that follows through the end of the sentence and inserting a period;

(C) in the second sentence, by striking "best scientific and commercial data available" and inserting "best available scientific data"; and

(D) by inserting "(A)" before the first sentence, and by adding at the end the following:

"(B) The Secretary may identify specific agency actions or categories of agency actions that may be determined to meet the standards of this paragraph by alternative procedures to the procedures set forth in this subsection and subsections (b) through (d), except that subsections (b)(4) and (e) may apply only to an action that the Secretary finds, or concurs, does meet such standards, and the Secretary shall suggest, or concur in any suggested, reasonable and prudent alternatives described in subsection (b)(3) for any action determined not to meet such standards. Any such agency action or category of agency actions shall be identified, and any such alternative procedures shall be established, by regulation promulgated prior or subsequent to the date of the enactment of this Act.";

(3) in paragraph (4)—

(A) by striking "listed under section 4" and inserting "an endangered species or a threatened species"; and

(B) by inserting ", under section 4" after "such species"; and

(4) by adding at the end the following:

"(5) Any Federal agency or the Secretary, in conducting any analysis pursuant to paragraph (2), shall consider only the effects of any agency action that are distinct from a baseline of all effects upon the relevant species that have occurred or are occurring prior to the action.".

(b) OPINION OF SECRETARY.—Section 7(b) (16 U.S.C. 1536(b)) is amended—

(1) in paragraph (1)(B)(i) by inserting "permit or license" before "applicant";

(2) in paragraph (2) by inserting "permit or license" before "applicant";

(3) in paragraph (3)(A)—

(A) in the first sentence—

(i) by striking "Promptly after" and inserting "Before";

(ii) by inserting "permit or license" before "applicant"; and

(iii) by inserting "proposed" before "written statement"; and

(B) by striking all after the first sentence and inserting the following: "The Secretary shall consider any comment from the Federal agency and the permit or license applicant, if any, prior to issuance of the final written statement of the Secretary's opinion. The Secretary shall issue the final written statement of the Secretary's opinion by providing the written statement to the Federal agency and the permit or license applicant, if any, and publishing notice of the written statement in the Federal Register. If jeopardy is found, the Secretary shall suggest in the final written statement those reasonable and prudent alternatives, if any, that the Secretary believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action. The Secretary shall cooperate with the Federal agency and any permit or license applicant in the preparation of any suggested reasonable and prudent alternatives.";

(4) in paragraph (4)—

(A) by redesignating subparagraphs (A), (B), and (C) as clauses (i), (ii), and (iii), respectively;

(B) by inserting "(A)" after "(4)";

(C) by striking "the Secretary shall provide" and all that follows through "with a written statement that—" and inserting the following: "the Secretary shall include in the written statement under paragraph (3), a statement described in subparagraph (B) of this paragraph.

"(B) A statement described in this subparagraph—"; and

(5) by adding at the end the following:

"(5)(A) Any terms and conditions set forth pursuant to paragraph (4)(B)(iv) shall be roughly proportional to the impact of the incidental taking identified pursuant to paragraph (4) in the written statement prepared under paragraph (3).

"(B) If various terms and conditions are available to comply with paragraph (4)(B)(iv), the terms and conditions set forth pursuant to that paragraph—

"(i) must be capable of successful implementation; and

"(ii) must be consistent with the objectives of the Federal agency and the permit or license applicant, if any, to the greatest extent possible.".

(c) BIOLOGICAL ASSESSMENTS.—Section 7(c) (16 U.S.C. 1536(c)) is amended—

(1) by striking "(1)";

(2) by striking paragraph (2);

(3) in the first sentence, by striking "which is listed" and all that follows through the end of the sentence and inserting "that is determined to be an endangered species or a threatened species, or for which such a determination is proposed pursuant to section 4, may be present in the area of such proposed action."; and

(4) in the second sentence, by striking "best scientific and commercial data available" and inserting "best available scientific data".

(d) ELIMINATION OF ENDANGERED SPECIES COMMITTEE PROCESS.—Section 7 (16 U.S.C. 1536) is amended—

(1) by repealing subsections (e), (f), (g), (h), (i), (j), (k), (l), (m), and (n);

(2) by redesignating subsections (o) and (p) as subsections (e) and (f), respectively;

(3) in subsection (e), as redesignated by paragraph (2) of this subsection—

(A) in the heading, by striking "EXEMPTION AS PROVIDING"; and

(B) by striking "such section" and all that follows through "(2)" and inserting "such section,"; and

(4) in subsection (f), as redesignated by paragraph (2) of this subsection—

(A) in the first sentence, by striking "is authorized" and all that follows through "of this section" and inserting "may exempt an agency action from compliance with the requirements of subsections (a) through (d) of this section before the initiation of such agency action,"; and

(B) by striking the second sentence.

SEC. 12. EXCEPTIONS TO PROHIBITIONS.

(a) INCIDENTAL TAKE PERMITS.—Section 10(a)(2) (16 U.S.C. 1539(a)(2)) is amended—

(1) in subparagraph (A) by striking "and" after the semicolon at the end of clause (iii), by redesignating clause (iv) as clause (vii), and by inserting after clause (iii) the following:

"(iv) objective, measurable biological goals to be achieved for species covered by the plan and specific measures for achieving such goals consistent with the requirements of subparagraph (B);

"(v) measures the applicant will take to monitor impacts of the plan on covered species and the effectiveness of the plan's measures in achieving the plan's biological goals;

"(vi) adaptive management provisions necessary to respond to all reasonably foreseeable changes in circumstances that could appreciably reduce the likelihood of the survival and recovery of any species covered by the plan; and";

(2) in subparagraph (B) by striking "and" after the semicolon at the end of clause (iv), by redesignating clause (v) as clause (vi), and by inserting after clause (iv) the following:

"(v) the term of the permit is reasonable, taking into consideration—

"(I) the period in which the applicant can be expected to diligently complete the principal actions covered by the plan;

"(II) the extent to which the plan will enhance the conservation of covered species;

"(III) the adequacy of information underlying the plan;

"(IV) the length of time necessary to implement and achieve the benefits of the plan; and

"(V) the scope of the plan's adaptive management strategy; and"; and

(3) by striking subparagraph (C) and inserting the following:

"(3) Any terms and conditions offered by the Secretary pursuant to paragraph (2)(B) to reduce or offset the impacts of incidental taking shall be roughly proportional to the impact of the incidental taking specified in the conservation plan pursuant to in paragraph (2)(A)(i). This paragraph shall not be construed to limit the authority of the Secretary to require greater than acre-for-acre mitigation where necessary to address the extent of such impacts. In any case in which various terms and conditions are available, the terms and conditions shall be capable of successful

implementation and shall be consistent with the objective of the applicant to the greatest extent possible.

"(4)(A) If the holder of a permit issued under this subsection for other than scientific purposes is in compliance with the terms and conditions of the permit, and any conservation plan or agreement incorporated by reference therein, the Secretary may not require the holder, without the consent of the holder, to adopt any new minimization, mitigation, or other measure with respect to any species adequately covered by the permit during the term of the permit, except as provided in subparagraphs (B) and (C) to meet circumstances that have changed subsequent to the issuance of the permit.

"(B) For any circumstance identified in the permit or incorporated document that has changed, the Secretary may, in the absence of consent of the permit holder, require only such additional minimization, mitigation, or other measures as are already provided in the permit or incorporated document for such changed circumstance.

"(C) For any changed circumstance not identified in the permit or incorporated document, the Secretary may, in the absence of consent of the permit holder, require only such additional minimization, mitigation, or other measures to address such changed circumstance that do not involve the commitment of any additional land, water, or financial compensation not otherwise committed, or the imposition of additional restrictions on the use of any land, water or other natural resources otherwise available for development or use, under the original terms and conditions of the permit or incorporated document.

"(D) The Secretary shall have the burden of proof in demonstrating and documenting, with the best available scientific data, the occurrence of any changed circumstances for purposes of this paragraph.

"(E) All permits issued under this subsection on or after the date of the enactment of the Threatened and Endangered Species Recovery Act of 2005, other than permits for scientific purposes, shall contain the assurances contained in subparagraphs (B) through (D) of this paragraph and paragraph (5)(A) and (B). Permits issued under this subsection on or after March 25, 1998, and before the date of the enactment of the Threatened and Endangered Species Recovery Act of 2005, other than permits for scientific purposes, shall be governed by the applicable sections of parts 17.22(b), (c), and (d), and 17.32(b), (c), and (d) of title 50, Code of Federal Regulations, as the same exist on the date of the enactment of the Threatened and Endangered Species Act of 2005.

"(5)(A) The Secretary shall revoke a permit issued under paragraph (2) if the Secretary finds that the permittee is not complying with the terms and conditions of the permit.

"(B) Any permit subject to paragraph (4)(A) may be revoked due to changed circumstances only if—

"(i) the Secretary determines that continuation of the activities to which the permit applies would be inconsistent with the criteria in paragraph (2)(B)(iv);

"(ii) the Secretary provides 60 days notice of revocation to the permittee; and

"(iii) the Secretary is unable to, and the permittee chooses not to, remedy the condition causing such inconsistency.".

(b) EXTENSION OF PERIOD FOR PUBLIC REVIEW AND COMMENT ON APPLICATIONS.—Section 10(c) (16 U.S.C. 1539(c)) is amended in the second sentence by striking "thirty" each place it appears and inserting "45".

(c) EXPERIMENTAL POPULATIONS.—Section 10(j) (16 U.S.C. 1539(j)) is amended—

(1) in paragraph (1), by striking "For purposes" and all that follows through the end of the paragraph and inserting the following: "For purposes of this subsection, the term 'experimental population' means any population (including any offspring arising therefrom) authorized by the Secretary for release under paragraph (2), but only when such population is in the area designated for it by the Secretary, and such area is, at the time of release, wholly separate geographically from areas occupied by nonexperimental populations of the same species. For purposes of this subsection, the term 'areas occupied by nonexperimental populations' means areas characterized by the sustained and predictable presence of more than negligible numbers of successfully reproducing individuals over a period of many years.";

(2) in paragraph (2)(B), by striking "information" and inserting "scientific data"; and

(3) in paragraph (2)(C)(i), by striking "listed" and inserting "determined to be an endangered species or a threatened species".

(d) WRITTEN DETERMINATION OF COMPLIANCE.—Section 10 (16 U.S.C. 1539) is amended by adding at the end the following:

"(k) WRITTEN DETERMINATION OF COMPLIANCE.—(1) A property owner (in this subsection referred to as a 'requester') may request the Secretary to make a written

determination that a proposed use of the owner's property that is lawful under State and local law will comply with section 9(a), by submitting a written description of the proposed action to the Secretary by certified mail.

"(2) A written description of a proposed use is deemed to be sufficient for consideration by the Secretary under paragraph (1) if the description includes—

"(A) the nature, the specific location, the lawfulness under State and local law, and the anticipated schedule and duration of the proposed use, and a demonstration that the property owner has the means to undertake the proposed use; and

"(B) any anticipated adverse impact to a species that is included on a list published under 4(c)(1) that the requestor reasonably expects to occur as a result of the proposed use.

"(3) The Secretary may request and the requestor may supply any other information that either believes will assist the Secretary to make a determination under paragraph (1).

"(4) If the Secretary does not make a determination pursuant to a request under this subsection because of the omission from the request of any information described in paragraph (2), the requestor may submit a subsequent request under this subsection for the same proposed use.

"(5)(A) Subject to subparagraph (B), the Secretary shall provide to the requestor a written determination of whether the proposed use, as proposed by the requestor, will comply with section 9(a), by not later than expiration of the 180-day period beginning on the date of the submission of the request.

"(B) The Secretary may request, and the requestor may grant, a written extension of the period under subparagraph (A).

"(6) If the Secretary fails to provide a written determination before the expiration of the period under paragraph (5)(A) (or any extension thereof under paragraph (5)(B)), the Secretary is deemed to have determined that the proposed use complies with section 9(a).

"(7) This subsection shall not apply with respect to agency actions that are subject to consultation under section 7.

"(8) Any use or action taken by the property owner in reasonable reliance on a written determination of compliance under paragraph (5) or on the application of paragraph (6) shall not be treated as a violation of section 9(a).

"(9) Any determination of compliance under this subsection shall remain effective—

"(A) in the case of a written determination provided under paragraph (5)(A), for the 10-year period beginning on the date the written determination is provided; or

"(B) in the case of a determination that under paragraph (6) the Secretary is deemed to have made, the 5-year period beginning on the first date the Secretary is deemed to have made the determination.

"(10) The Secretary may withdraw a determination of compliance under this section only if the Secretary determines that, because of unforeseen changed circumstances, the continuation of the use to which the determination applies would preclude conservation measures essential to the survival of any endangered species or threatened species. Such a withdrawal shall take effect 10 days after the date the Secretary provides notice of the withdrawal to the requester.

"(11) The Secretary may extend the period that applies under paragraph (5) by up to 180 days if seasonal considerations make a determination impossible within the period that would otherwise apply.".

(e) NATIONAL SECURITY EXEMPTION.—Section 10 (16 U.S.C. 1539) is further amended by adding at the end the following:

"(l) NATIONAL SECURITY.—The President, after consultation with the appropriate Federal agency, may exempt any act or omission from the provisions of this Act if such exemption is necessary for national security.".

(f) DISASTER DECLARATION AND PROTECTION.—Section 10 (16 U.S.C. 1539) is further amended by adding at the end the following:

"(m) DISASTER DECLARATION AND PROTECTION.—(1) The President may suspend the application of any provision of this Act in any area for which a major disaster is declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.).

"(2) The Secretary shall, within one year after the date of the enactment of the Threatened and Endangered Species Recovery Act of 2005, promulgate regulations regarding application of this Act in the event of an emergency (including circumstances other than a major disaster referred to in paragraph (1)) involving a threat to human health or safety or to property, including regulations—

"(A) determining what constitutes an emergency for purposes of this paragraph; and

"(B) to address immediate threats through expedited consideration under or waiver of any provision of this Act.".

SEC. 13. PRIVATE PROPERTY CONSERVATION.

Section 13 (consisting of amendments to other laws, which have executed) is amended to read as follows:

"PRIVATE PROPERTY CONSERVATION

"SEC. 13. (a) IN GENERAL.—The Secretary may provide conservation grants (in this section referred to as 'grants') to promote the voluntary conservation of endangered species and threatened species by owners of private property and shall provide financial conservation aid (in this section referred to as 'aid') to alleviate the burden of conservation measures imposed upon private property owners by this Act. The Secretary may provide technical assistance when requested to enhance the conservation effects of grants or aid.

"(b) AWARDING OF GRANTS AND AID.—Grants to promote conservation of endangered species and threatened species on private property—

"(1) may not be used to fund litigation, general education, general outreach, lobbying, or solicitation;

"(2) may not be used to acquire leases or easements of more than 50 years duration or fee title to private property;

"(3) must be designed to directly contribute to the conservation of an endangered species or threatened species by increasing the species' numbers or distribution; and

"(4) must be supported by any private property owners on whose property any grant funded activities are carried out.

"(c) PRIORITY.—Priority shall be accorded among grant requests in the following order:

"(1) Grants that promote conservation of endangered species or threatened species on private property while making economically beneficial and productive use of the private property on which the conservation activities are conducted.

"(2) Grants that develop, promote, or use techniques to increase the distribution or population of an endangered species or threatened species on private property.

"(3) Other grants that promote voluntary conservation of endangered species or threatened species on private property.

"(d) ELIGIBILITY FOR AID.—(1) The Secretary shall award aid to private property owners who—

"(A) received a written determination under section 10(k) finding that the proposed use of private property would not comply with section 9(a); or

"(B) receive notice under section 10(k)(10) that a written determination has been withdrawn.

"(2) Aid shall be in an amount no less than the fair market value of the use that was proposed by the property owner if—

"(A) the owner has foregone the proposed use;

"(B) the owner has requested financial aid—

"(i) within 180 days of the Secretary's issuance of a written determination that the proposed use would not comply with section 9(a); or

"(ii) within 180 days after the property owner is notified of a withdrawal under section 10(k)(10); and

"(C) the foregone use would be lawful under State and local law and the property owner has demonstrated that the property owner has the means to undertake the proposed use.

"(e) DISTRIBUTION OF GRANTS AND AID.—(1) The Secretary shall pay eligible aid—

"(A) within 180 days after receipt of a request for aid unless there are unresolved questions regarding the documentation of the foregone proposed use or unresolved questions regarding the fair market value; or

"(B) at the resolution of any questions concerning the documentation of the foregone use established under subsection (f) or the fair market value established under subsection (g).

"(2) All grants provided under this section shall be paid on the last day of the fiscal year. Aid shall be paid based on the date of the initial request.

"(f) DOCUMENTATION OF THE FOREGONE USE.—Within 30 days of the request for aid, the Secretary shall enter into negotiations with the property owner regarding the documentation of the foregone proposed use through such mechanisms such as contract terms, lease terms, deed restrictions, easement terms, or transfer of title. If the Secretary and the property owner are unable to reach an agreement, then, within 60 days of the request for aid, the Secretary shall determine how the prop-

erty owner's foregone use shall be documented with the least impact on the ownership interests of the property owner necessary to document the foregone use.

"(g) FAIR MARKET VALUE.—For purposes of this section, the fair market value of the foregone use of the affected portion of the private property, including business losses, is what a willing buyer would pay to a willing seller in an open market. Fair market value shall take into account the likelihood that the foregone use would be approved under State and local law. The fair market value shall be determined within 180 days of the documentation of the foregone use. The fair market value shall be determined jointly by 2 licensed independent appraisers, one selected by the Secretary and one selected by the property owner. If the 2 appraisers fail to agree on fair market value, the Secretary and the property owner shall jointly select a third licensed appraiser whose appraisal within an additional 90 days shall be binding on the Secretary and the private property owner. Within one year after the date of enactment of the Threatened and Endangered Species Recovery Act of 2005, the Secretary shall promulgate regulations regarding selection of the jointly selected appraisers under this subsection.

"(h) LIMITATION ON AID AVAILABILITY.—Any person receiving aid under this section may not receive additional aid under this section for the same foregone use of the same property and for the same period of time.

"(i) ANNUAL REPORTING.—The Secretary shall by January 15 of each year provide a report of all aid and grants awarded under this section to the Committee on Resources of the House of Representatives and the Environment and Public Works Committee of the Senate and make such report electronically available to the general public on the website required under section 14.".

SEC. 14. PUBLIC ACCESSIBILITY AND ACCOUNTABILITY.

Section 14 (relating to repeals of other laws, which have executed) is amended to read as follows:

"PUBLIC ACCESSIBILITY AND ACCOUNTABILITY

"SEC. 14. The Secretary shall make available on a publicly accessible website on the Internet—

"(1) each list published under section 4(c)(1);

"(2) all final and proposed regulations and determinations under section 4;

"(3) the results of all 5-year reviews conducted under section 4(c)(2)(A);

"(4) all draft and final recovery plans issued under section 5(a), and all final recovery plans issued and in effect under section 4(f)(1) of this Act as in effect immediately before the enactment of the Threatened and Endangered Species Recovery Act of 2005;

"(5) all reports required under sections 5(e) and 16, and all reports required under sections 4(f)(3) and 18 of this Act as in effect immediately before the enactment of the Threatened and Endangered Species Recovery Act of 2005; and

"(6) data contained in the reports referred to in paragraph (5) of this section, and that were produced after the date of enactment of the Threatened and Endangered Species Recovery Act of 2005, in the form of databases that may be searched by the variables included in the reports.".

SEC. 15. ANNUAL COST ANALYSES.

(a) ANNUAL COST ANALYSES.—Section 18 (16 U.S.C. 1544) is amended to read as follows:

"ANNUAL COST ANALYSIS BY UNITED STATES FISH AND WILDLIFE SERVICE

"SEC. 18. (a) IN GENERAL.—On or before January 15 of each year, the Secretary shall submit to the Congress an annual report covering the preceding fiscal year that contains an accounting of all reasonably identifiable expenditures made primarily for the conservation of species included on lists published and in effect under section 4(c).

"(b) SPECIFICATION OF EXPENDITURES.—Each report under this section shall specify—

"(1) expenditures of Federal funds on a species-by-species basis, and expenditures of Federal funds that are not attributable to a specific species;

"(2) expenditures by States for the fiscal year covered by the report on a species-by-species basis, and expenditures by States that are not attributable to a specific species; and

"(3) based on data submitted pursuant to subsection (c), expenditures voluntarily reported by local governmental entities on a species-by-species basis, and such expenditures that are not attributable to a specific species.

"(c) ENCOURAGEMENT OF VOLUNTARY SUBMISSION OF DATA BY LOCAL GOVERNMENTS.—The Secretary shall provide a means by which local governmental entities may—

"(1) voluntarily submit electronic data regarding their expenditures for conservation of species listed under section 4(c); and

"(2) attest to the accuracy of such data.".

(b) ELIGIBILITY OF STATES FOR FINANCIAL ASSISTANCE.—Section 6(d) (16 U.S.C. 1535(d)) is amended by adding at the end the following:

"(3) A State shall not be eligible for financial assistance under this section for a fiscal year unless the State has provided to the Secretary for the preceding fiscal year information regarding the expenditures referred to in section 16(b)(2).".

SEC. 16. REIMBURSEMENT FOR DEPREDATION OF LIVESTOCK BY REINTRODUCED SPECIES.

The Endangered Species Act of 1973 is further amended—

(1) by striking sections 15 and 16;

(2) by redesignating sections 17 and 18 as sections 15 and 16, respectively; and

(3) by adding after section 16, as so redesignated, the following:

"REIMBURSEMENT FOR DEPREDATION OF LIVESTOCK BY REINTRODUCED SPECIES

"SEC. 17. (a) IN GENERAL.—The Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, may reimburse the owner of livestock for any loss of livestock resulting from depredation by any population of a species if the population is listed under section 4(c) and includes or derives from members of the species that were reintroduced into the wild.

"(b) ELIGIBILITY FOR AND AMOUNT.—Eligibility for, and the amount of, reimbursement under this section shall not be conditioned on the presentation of the body of any animal for which reimbursement is sought.

"(c) LIMITATION ON REQUIREMENT TO PRESENT BODY.—The Secretary may not require the owner of livestock to present the body of individual livestock as a condition of payment of reimbursement under this section.

"(d) USE OF DONATIONS.—The Secretary may accept and use donations of funds to pay reimbursement under this section.

"(e) AVAILABILITY OF APPROPRIATIONS.—The requirement to pay reimbursement under this section is subject to the availability of funds for such payments.".

SEC. 17. AUTHORIZATION OF APPROPRIATIONS.

(a) AUTHORIZATION.—The Endangered Species Act of 1973 is further amended by adding at the end the following:

"AUTHORIZATION OF APPROPRIATIONS

"SEC. 18. (a) IN GENERAL.—There are authorized to be appropriated to carry out this Act, other than section 8A(e)—

"(1) to the Secretary of the Interior to carry out functions and responsibilities of the Department of the Interior under this Act, such sums as are necessary for fiscal years 2006 through 2010; and

"(2) to the Secretary of Agriculture to carry out functions and responsibilities of the Department of the Interior with respect to the enforcement of this Act and the convention which pertain the importation of plants, such sums as are necessary for fiscal year 2006 through 2010.

"(b) CONVENTION IMPLEMENTATION.—There is authorized to be appropriated to the Secretary of the Interior to carry out section 8A(e) such sums as are necessary for fiscal years 2006 through 2010.".

(b) CONFORMING AMENDMENT.—Section 8(a) (16 U.S.C. 1537(a)) is amended by striking "section 15" and inserting "section 18".

SEC. 18. MISCELLANEOUS TECHNICAL CORRECTIONS.

(a) INTERNATIONAL COOPERATION.—Section 8 (16 U.S.C. 1537) is amended—

(1) in subsection (a) in the first sentence by striking "any endangered species or threatened species listed" and inserting "any species determined to be an endangered species or a threatened species"; and

(2) in subsection (b) in paragraph (1), by striking "endangered species and threatened species listed" and inserting "species determined to be endangered species and threatened species".

(b) MANAGEMENT AUTHORITY AND SCIENTIFIC AUTHORITY.—Section 8A (16 U.S.C. 1537a)) is amended—

(1) in subsection (a), by striking "of the Interior (hereinafter in this section referred to as the 'Secretary')";

(2) in subsection (d), by striking "Merchant Marine and Fisheries" and inserting "Resources"; and

(3) in subsection (e)—

(A) in paragraph (1), by striking "of the Interior (hereinafter in this subsection referred to as the 'Secretary')"; and

(B) by striking paragraph (3) and redesignating paragraph (4) as paragraph (3).

(c) PROHIBITED ACTS.—Section 9 (16 U.S.C. 1538) is amended—

(1) in subsection (a)—

(A) in paragraph (1), in the matter preceding subparagraph (A), by striking "of this Act, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act" and inserting ", with respect to any species of fish or wildlife determined to be an endangered species under section 4";

(B) in paragraph (1)(G), by striking "threatened species of fish or wildlife listed pursuant to section 4 of this Act" and inserting "species of fish or wildlife determined to be a threatened species under section 4";

(C) in paragraph (2), in the matter preceding subparagraph (A) by striking "of this Act, with respect to any endangered species of plants listed pursuant to section 4 of this Act" and inserting ", with respect to any species of plants determined to be an endangered species under section 4"; and

(D) in paragraph (2)(E), by striking "listed pursuant to section 4 of this Act" and inserting "determined to be a threatened species under section 4";

(2) in subsection (b)—

(A) by striking "(1)" before "SPECIES" and inserting "(1)" before the first sentence;

(B) in paragraph (1), in the first sentence, by striking "adding such" and all that follows through ": *Provided,* That" and inserting "determining such fish or wildlife species to be an endangered species or a threatened species under section 4, if"; and

(C) in paragraph (1), in the second sentence, by striking "adding such" and all that follows through "this Act" and inserting "determining such fish or wildlife species to be an endangered species or a threatened species under section 4";

(3) in subsection (c)(2)(A), by striking "an endangered species listed" and inserting "a species determined to be an endangered species";

(4) in subsection (d)(1)(A), by striking clause (i) and inserting the following: "(i) are not determined to be endangered species or threatened species under section 4, and";

(5) in subsection (e), by striking clause (1) and inserting the following: "(1) are not determined to be endangered species or threatened species under section 4, and"; and

(6) in subsection (f)—

(A) in paragraph (1), in the first sentence, by striking clause (A) and inserting the following: "(A) are not determined to be endangered species or threatened species under section 4, and"; and

(B) by striking "Secretary of the Interior" each place it appears and inserting "Secretary".

(d) HARDSHIP EXEMPTIONS.—Section 10(b) (16 U.S.C. 1539(b)) is amended—

(1) in paragraph (1)—

(A) by striking "an endangered species" and all that follows through "section 4 of this Act" and inserting "an endangered species or a threatened species and the subsequent determination that the species is an endangered species or a threatened species under section 4";

(B) by striking "section 9(a) of this Act" and inserting "section 9(a)"; and

(C) by striking "fish or wildlife listed by the Secretary as endangered" and inserting "fish or wildlife determined to be an endangered species or threatened species by the Secretary"; and

(2) in paragraph (2)—

(A) by inserting "or a threatened species" after "endangered species" each place it appears; and

(B) in subparagraph (B), by striking "listed species" and inserting "endangered species or threatened species".

(e) PERMIT AND EXEMPTION POLICY.—Section 10(d) (16 U.S.C. 1539(d)) is amended—

(1) by inserting "or threatened species" after "endangered species"; and

(2) by striking "of this Act".

(f) PRE-ACT PARTS AND SCRIMSHAW.—Section 10(f) (16 U.S.C. 1539(f)) is amended—

(1) by inserting after "(f)" the following: "PRE-ACT PARTS AND SCRIMSHAW.—"; and

(2) in paragraph (2), by striking "of this Act" each place it appears.

(g) BURDEN OF PROOF IN SEEKING EXEMPTION OR PERMIT.—Section 10(g) (16 U.S.C. 1539(g)) is amended by inserting after "(g)" the following: "BURDEN OF PROOF IN SEEKING EXEMPTION OR PERMIT.—".

(h) ANTIQUE ARTICLES.—Section 10(h)(1)(B) (16 U.S.C. 1539(h)(1)(B)) is amended by striking "endangered species or threatened species listed" and inserting "species determined to be an endangered species or a threatened species".

(i) PENALTIES AND ENFORCEMENT.—Section 11 (16 U.S.C. 1540) is amended in subsection (e)(3), in the second sentence, by striking "Such persons" and inserting "Such a person".

(j) SUBSTITUTION OF GENDER-NEUTRAL REFERENCES.—

(1) "SECRETARY" FOR "HE".—The following provisions are amended by striking "he" each place it appears and inserting "the Secretary":

(A) Paragraph (4)(C) of section 4(b), as redesignated by section 5(b)(2) of this Act.

(B) Paragraph (5)(B)(ii) of section 4(b), as redesignated by section 5(b)(2) of this Act.

(C) Section 4(b)(7) (16 U.S.C. 1533(b)(7)), in the matter following subparagraph (B).

(D) Section 6 (16 U.S.C. 1535).

(E) Section 8(d) (16 U.S.C. 1537(d)).

(F) Section 9(f) (16 U.S.C. 1538(f)).

(G) Section 10(a) (16 U.S.C. 1539(a)).

(H) Section 10(b)(3) (16 U.S.C. 1539(b)(3)).

(I) Section 10(d) (16 U.S.C. 1539(d)).

(J) Section 10(e)(4) (16 U.S.C. 1539(e)(4)).

(K) Section 10(f)(4), (5), and (8)(B) (16 U.S.C. 1599(f)(4), (5), (8)(B)).

(L) Section 11(e)(5) (16 U.S.C. 1540(e)(5)).

(2) "PRESIDENT" FOR "HE".—Section 8(a) (16 U.S.C. 1537(a)) is amended in the second sentence by striking "he" and inserting "the President".

(3) "SECRETARY OF THE INTERIOR" FOR "HE".—Section 8(b)(3) (16 U.S.C. 1537(b)(3)) is amended by striking "he" and inserting "the Secretary of the Interior".

(4) "PERSON" FOR "HE".—The following provisions are amended by striking "he" each place it appears and inserting "the person":

(A) Section 10(f)(3) (16 U.S.C. 1539(f)(3)).

(B) Section 11(e)(3) (16 U.S.C. 1540(e)(3)).

(5) "DEFENDANT" FOR "HE".—The following provisions are amended by striking "he" each place it appears and inserting "the defendant".

(A) Section 11(a)(3) (16 U.S.C. 1540(a)(3)).

(B) Section 11(b)(3) (16 U.S.C. 1540(b)(3)).

(6) REFERENCES TO "HIM".—

(A) Section 4(c)(1) (16 U.S.C. 1533(c)(1)) is amended by striking "him or the Secretary of Commerce" each place it appears and inserting "the Secretary".

(B) Paragraph (6) of section 4(b) (16 U.S.C. 1533(b)), as redesignated by section 5(b)(2) of this Act, is further amended in the matter following subparagraph (B) by striking "him" and inserting "the Secretary".

(C) Section 5(k)(2), as redesignated by section 9(a)(1) of this Act, is amended by striking "him" and inserting "the Secretary".

(D) Section 7(a)(1) (16 U.S.C. 1536(a)(1)) is amended in the first sentence by striking "him" and inserting "the Secretary".

(E) Section 8A(c)(2) (16 U.S.C. 1537a(c)(2)) is amended by striking "him" and inserting "the Secretary".

(F) Section 9(d)(2)(A) (16 U.S.C. 1538(d)(2)(A)) is amended by striking "him" each place it appears and inserting "such person".

(G) Section 10(b)(1) (16 U.S.C. 1539(b)(1)) is amended by striking "him" and inserting "the Secretary".

(7) REFERENCES TO "HIMSELF OR HERSELF".—Section 11 (16 U.S.C. 1540) is amended in subsections (a)(3) and (b)(3) by striking "himself or herself" each place it appears and inserting "the defendant".

(8) REFERENCES TO "HIS".—

(A) Section 4(g)(1), as redesignated by section 8(1) of this Act, is amended by striking "his" and inserting "the".

(B) Section 6 (16 U.S.C. 1535) is amended—

(i) in subsection (d)(2) in the matter following clause (ii) by striking "his" and inserting "the Secretary's"; and

(ii) in subsection (e)(1), as designated by section 10(3)(A) of this Act, by striking "his periodic review" and inserting "periodic review by the Secretary".

(C) Section 7(a)(3) (16 U.S.C. 1536(a)(3)) is amended by striking "his" and inserting "the applicant's".

(D) Section 8(c)(1) (16 U.S.C. 1537(c)(1)) is amended by striking "his" and inserting "the Secretary's".

(E) Section 9 (16 U.S.C. 1538) is amended in subsection (d)(2)(B) and subsection (f) by striking "his" each place it appears and inserting "such person's".

(F) Section 10(b)(3) (16 U.S.C. 1539(b)(3)) is amended by striking "his" and inserting "the Secretary's".

(G) Section 10(d) (16 U.S.C. 1539(d)) is amended by striking "his" and inserting "the".

(H) Section 11 (16 U.S.C. 1540) is amended—

(i) in subsection (a)(1) by striking "his" and inserting "the Secretary's";

(ii) in subsections (a)(3) and (b)(3) by striking "his or her" each place it appears and inserting "the defendant's";

(iii) in subsection (d) by striking "his" and inserting "the officer's or employee's";

(iv) in subsection (e)(3) in the second sentence by striking "his" and inserting "the person's"; and

(v) in subsection (g)(1) by striking "his" and inserting "the person's".

SEC. 19. CLERICAL AMENDMENT TO TABLE OF CONTENTS.

The table of contents in the first section is amended—

(1) by striking the item relating to section 5 and inserting the following:

"Sec. 5. Recovery plans and land acquisition."

(2) by striking the items relating to sections 13 through 17 and inserting the following:

"Sec. 13. Private property conservation.
"Sec. 14. Public accessibility and accountability.
"Sec. 15. Marine Mammal Protection Act of 1972.
"Sec. 16. Annual cost analysis by United States Fish and Wildlife Service.
"Sec. 17. Reimbursement for depredation of livestock by reintroduced species.
"Sec. 18. Authorization of appropriations.".

SEC. 20. CERTAIN ACTIONS DEEMED IN COMPLIANCE.

(a) ACTIONS DEEMED IN COMPLIANCE.—During the period beginning on the date of the enactment of this Act and ending on the date described in subsection (b), any action that is taken by a Federal agency, State agency, or other person and that complies with the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 et seq.) is deemed to comply with sections 7(a)(2) and 9(a)(1)(B) of the Endangered Species Act of 1973 (16 U.S.C. 1536(a)(2), 1538(a)(1)(B)) (as amended by this Act) and regulations issued under section 4(d) of such Act (16 U.S.C. 1533(d)).

(b) TERMINATION DATE.—The date referred to in subsection (a) is the earlier of—

(1) the date that is 5 years after the date of the enactment of this Act; and

(2) the date of the completion of any procedure required under subpart D of part 402 of title 50, Code of Federal Regulations, with respect to the action referred to in subsection (a).

(c) LIMITATION ON APPLICATION.—This section shall not affect any procedure pursuant to part 402 of title 50, Code of Federal Regulations, that is required by any court order issued before the date of the enactment of this Act.

PURPOSE OF THE BILL

The purpose of H.R. 3824 is to amend and reauthorize the Endangered Species Act of 1973 to provide greater results conserving and recovering listed species, and for other purposes.

BACKGROUND AND NEED FOR LEGISLATION

Prior to 1966, authority for wildlife protection rested primarily with the States, except where the wildlife was highly migratory or where wildlife was taken in violation of State or federal law or was transported across State boundaries. In response to a concern that various species had become or were in danger of becoming extinct,

the federal government began to enact legislation protecting endangered and threatened fish, wildlife and plants. Congress' efforts culminated in 1973 with the passage of the Endangered Species Act of 1973 (ESA, Public Law 93–205, 16 U.S.C. 1531 *et seq.*) which has become our Nation's strictest and most stringent environmental law. In conjunction with the Convention on International Trade in Endangered Species of Wild Flora and Fauna, the ESA embodies a rigid and comprehensive approach to species protection in the United States and throughout the world.

The ESA was passed by Congress with the intent to protect and preserve species that have been identified as threatened or endangered. Over the past 32 years more than 1800 species have been listed for protection. Under the ESA, the Secretary of the Department of the Interior, though the U.S. Fish and Wildlife Service, has responsibility for plants, wildlife and inland fishes. The Secretary of Commerce through the National Marine Fisheries Service, is responsible for implementing the ESA with respect to ocean-going fish and marine animals. In addition, the Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) oversees the import and export of endangered species from foreign countries through the Nation's ports.

Once a species is listed as endangered or threatened, ESA section 4 requires the relevant Secretary to declare "critical habitat" for an endangered species which limits uses of the declared lands or waters. Different protection standards can be issued for threatened species. Section 6 of the ESA authorizes the Secretary to enter into cooperative or management agreements with States for conservation of listed species. Under ESA section 7, federal agencies whose actions (including actions authorized, funded or directly carried out by the agency) are "likely to jeopardize the continued existence" of an endangered or threatened species must consult with the Secretary. After the consultation, the Secretary is to issue a written "jeopardy opinion" detailing how the proposed agency action affects the species or its critical habitat, and the Secretary may suggest reasonable alternatives to the proposed action which will not jeopardize the species or its habitat. The Secretary may also conclude that the agency action does not violate the ESA or results only in " incidental take" of the species. Section 9 of the ESA prohibits various actions regarding the species, including the "take" of a species, which includes harassment, harm, pursuit, capture or killing. Section 7 also establishes the Endangered Species Committee to resolve conflicts in the administration of and grant exemptions from ESA. Under ESA section 10, the Secretary may permit any act that would otherwise violate ESA section 9 for scientific purposes or if the "taking" of the species is incidental to and not the purpose of an otherwise lawful activity.

The ESA has been marked by conflict, litigation and cumbersome processes and failed to produce the goal all Americans share, recovering and endangered species. According to the U.S. Fish and Wildlife Service, only 10 (or less than 1%) of the roughly 1300 domestic species listed as endangered or threatened have been recovered in the ESA's 34-year history. What is the status of the remaining listed species? According to the Fish and Wildlife Service data: 39 percent of the ESA's listed species are classified as being in "unknown" status, which could include extinction; 21 percent are clas-

sified as "declining;" 3 percent are classified as "believed to be extinct," though they remain on the list; 30 percent are classified as "stable," though for many species in this category, this classification is a result of corrections to original data error, rather than actual accomplishments of the ESA; and only 6 percent are classified by the Fish and Wildlife Service as "improving." Moreover, according to official Fish and Wildlife Service data, 77 percent of all the listed species have only achieved somewhere between zero and one quarter of their recovery goals.[1] These are not the statistics of a successful law after more than three decades of implementation.

H.R. 3824, the Threatened and Endangered Species Recovery Act of 2005 (TESRA), will place a new emphasis on conservation and recovery, eliminates the dysfunctional critical habitat provisions that the last two Administrations have recognized as ineffective for conservation, removes the conservation burden that has been unfairly imposed on private property owners and reestablishes a meaningful distinction between endangered and threatened species. It also provides for more transparency in the ESA program, accountability, and stronger scientific safeguards, improves numerous aspects of the consultation program and provides incentives and larger roles for States, local governments and Indian tribes.

Among TESRA's provisions are those aimed at fostering recovery of endangered species, drawing not only on those who have knowledge and skills essential to guide effective conservation efforts but also those who have property or livelihoods affected by species—where any successful program must be made to work—to foster collaborative rather than confrontational recovery programs.

TESRA provides new tools like Threatened and Endangered Species Incentives Program to enlist private property owners as allies in species conservation. The bill provides landowners who participate in Habitat Conservation Plans assurances against surprises. TESRA requires the Secretary of the Interior to provide a clear answer for landowners whether a proposed property use would violate the ESA. In those cases where there is a conflict, TESRA provides for conservation aid that reduces the burden of regulation on property owners when use of their private property has been restricted for conservation, thus ensuring that individual property owners are not forced to shoulder the financial burden of conserving endangered and threatened species for all Americans.

Section 4(d) of the ESA authorizes the Secretaries of the Interior and Commerce "by regulation" to apply to "any threatened species" any of the prohibitions (most notably the "take" prohibition) that section 9 of the ESA establishes for endangered species. The fundamental purpose of this provision is to allow each Secretary to tailor prohibitions for any less imperiled threatened species that the ESA automatically applies to all of the more imperiled endangered species. While the Secretary of Commerce has interpreted this language to mean that he or she is to issue individual rules tailoring whatever prohibitions are needed to each specific threatened species, the Secretary of the Interior has issued a blanket rule that applies all of the ESA section 9 prohibitions automatically to virtually

[1] In fairness, this number includes the species in the "unknown" category because of the inability to gauge their status.

all of the threatened species whenever they have been or will be listed.

Section 8 of TESRA, as introduced, would have directed the Secretaries to take the approach followed by the Secretary of Commerce. The provision would have required that the underlying intent of ESA section 4(d)—to require the tailoring of, and application to, threatened species on a species-specific basis any of the general statutory prohibitions for endangered species—be accomplished by the elimination of the Secretary of the Interior's blanket applicability approach and the application of any ESA section 9 prohibitions to any threatened species by the issuance of individual rules for particular threatened species (or groups of threatened species whose specific threats or biological conditions are sufficiently similar to warrant application of identical prohibitions). An amendment striking TESRA section 8 was adopted when members of the Committee pointed out that the problem that section addressed was created by a single U.S. Fish and Wildlife Service rule which could be remedied by rulemaking without statutory change. The amendment striking section 8 was agreed to on that basis. The Committee expects and directs the Secretary of the Interior to conduct promptly a rulemaking to reconsider and eliminate or restructure the U.S. Fish and Wildlife Service rule—50 CFR 17.31(a)—in light of this report and legislative history.

COMMITTEE ACTION

Committee on Resources Chairman Richard Pombo (R–CA) introduced H.R. 3824 on September 19, 2005, along with Congressman Dennis Cardoza (D–CA), Congressman Joe Baca (D–CA), Congressman Marion Berry (D–AR), Congressman Henry E. Brown, Jr. (R–SC), Congressman Jim Costa (D–CA), Congresswoman Barbara Cubin (R–WY), Congressman Jim Gibbons (R–NV), Congressman Sam Graves (R–MO), Congresswoman Cathy McMorris (R–WA), Congressman George Radanovich (R–CA), Congressman Mike Ross (D–AR), Congressman Bennie G. Thompson (D–MS), Congressman Greg Walden (R–OR), Congressman Chris Cannon (R–UT), Delegate Madeleine Bordallo (D–GU), Congressman Ken Calvert (R–CA), Congresswoman Thelma Drake (R–VA), Congressman Rick Renzi (R–AZ), Congressman Don Young (R–AK), Congressman Louie Gohmert (R–TX), Congressman Henry Bonilla (R–TX), Congressman Tom G. Tancredo (R–CO), Congressman Dan Boren (D–OK), Congressman K. Michael Conaway (R–TX), Congressman Randy Neugebauer (R–TX), Congressman Daniel E. Lungren (R–CA), Congresswoman Marsha Blackburn (R–TN), Congressman C.L. "Butch" Otter (R–ID), Congressman Mac Thornberry (R–TX), Congressman John T. Doolittle (R–CA), Congressman Collin C. Peterson (D–MN), Congressman John B. Shadegg (R–AZ), Congressman Dennis R. Rehberg (R–MT), Congressman Geoff Davis (R–KY), Congressman Ron Lewis (R–KY), Congressman John J. Duncan, Jr. (R–TN), Congressman John Sullivan (R–OK), Congressman Michael K. Simpson (R–ID), Congressman Randy "Duke" Cunningham (R–CA), Congressman Duncan Hunter (R–CA), Congressman Devin Nunes (R–CA), Congressman William M. Thomas (R–CA), Congressman Steve King (R–IA), Congressman Darrell E. Issa (R–CA), Congressman Bobby Jindal (R–LA), Congressman John E. Peterson (R–PA), Congressman Sanford D. Bishop, Jr. (D–

GA), Resident Commissioner Luis G. Fortuño (R–PR), Congressman J.D. Hayworth (R–AZ), Congressman Stevan Pearce (R–NM), Congresswoman Marilyn N. Musgrave (R–CO), Congressman Jeff Flake (R–AZ), Congressman Howard P. "Buck" McKeon (R–CA), Delegate Eni F. H. Faleomavaega (D–AS), Congressman Charlie Melancon (D–LA), Congressman Mark E. Souder (R–IN), Congressman Jack Kingston (R–GA), Congresswoman Jo Ann Emerson (R–MO), Congressman Dave Weldon (R–FL), Congressman Kevin Brady (R–TX), Congressman Frank D. Lucas (R–OK), Congresswoman Virginia Foxx (R–NC), Congressman John Kline (R–MN), Congressman David Scott (D–GA), Congressman Dana Rohrabacher (R–CA), Congressman Bill Shuster (R–PA), Congressman Gary Miller (R–CA), Congressman Michael T. McCaul (R–TX), Congressman Wally Herger (R–CA), Congressman Mark R. Kennedy (R–MN), Congressman Charlie Norwood (R–GA), Congressman William L. Jenkins (R–TN), Congressman Don Sherwood (R–PA), Congressman Trent Franks (R–AZ), Congressman John Boozman (R–AZ), Congressman Tom Cole (R–OK), Congressman Charles W. "Chip" Pickering (R–MS), Congressman Joe Barton (R–TX), Congressman Solomon P. Ortiz (D–TX), Congressman Spencer Bachus (R–AL), Congressman Chet Edwards (D–TX), Congressman Artur Davis (D–AL), Congressman Jim Ryun (R–KS), Congressman Richard H. Baker (R–LA), Mike Rogers (R–AL), Terry Everett (R–AL), Congressman Jo Bonner (R–AL), Congressman Phil Gingrey (R–GA), Congressman Robert B. Aderholt (R–AL), Congressman Lamar Smith (R–TX), Congressman Mike McIntyre (D–NC), Congressman Robert E. "Bud" Cramer (D–AL), Congressman Rubén Hinojosa (D–TX), Congressman Tom Osborne (R–NE), Congresswoman Ginny Brown-Waite (R–FL), Congresswoman Eddie Bernice Johnson (D–TX), and Congresswoman Sheila Jackson-Lee (D–TX) (as of the preparation of this report).

The bill was referred to the Committee on Resources. On September 21, 2005, the Committee held a hearing on the bill. On September 22, 2005, the Committee met to mark up the bill. The following amendments were offered:

Resources Committee Chairman Richard Pombo (R–CA) offered an en bloc set of technical amendments to sections 10 and 13 of the bill. They were adopted by voice vote.

Congressman Tom Udall (D–NM) offered an amendment to strike the definition of "best available scientific data" from section 3 of the ESA. The amendment failed by voice vote.

Congressman Greg Walden (R–OR) offered and withdrew an amendment regarding the application of "jeopardize the continued existence."

Congresswoman Stephanie Herseth (D–SD) offered and withdrew an amendment regarding peer review.

Congressman Peter DeFazio (D–OR) offered an amendment to strike the determination of distinct population of vertebrate fish or wildlife only sparingly. The amendment failed by voice vote.

Congressman Jay Inslee (D–WA) offered an amendment to deem a species as endangered or threatened if the Secretary of the Interior fails to make a determination within 180 days of the species being proposed. The amendment failed by voice vote.

Congressman John E. Peterson (R–PA) offered and withdrew an amendment which required the Secretary of the Interior to prepare

an analysis of the economic impact, the impact on national security and other relevant impact of a determination that a species is endangered or threatened.

Congressman Jim Saxton (R–NJ) offered an amendment to strike section 5 of the bill (Repeal of Critical Habitat Requirements). The amendment failed by voice vote.

Congressman Jim Saxton offered and withdrew an amendment to strike the repeal of the critical habitat requirements under section 4 of the ESA and insert instead provisions on protection of critical habitat and survival habitat.

Congressman Mark Udall (D–CO) offered an amendment to strike section 8 (Protective Regulations). The amendment was adopted by voice vote.

Congressman Jim Costa (D–CA) offered an amendment to section 9 of the bill to include counties along with Governors and State agencies in commenting on regulations issued by the Secretary of the Interior under section 4 of the ESA. Chairman Pombo offered an amendment to the Costa amendment to include units of local government. The Pombo amendment to the Costa amendment was adopted by unanimous consent. The Costa amendment, as amended, was adopted by voice vote.

Congressman Jim Saxton offered an amendment to strike the recovery plan process in section 10 of the bill and replace it with a different process. Chairman Richard Pombo offered an amendment to the Saxton amendment to strike all the text but the requirement that recovery plans be prepared or revised within 10 years of the date of enactment of TESRA. The Pombo amendment to the Saxton amendment was agreed to by unanimous consent. The Saxton amendment, as amended, by adopted by voice vote.

Congressman Edward Markey (D–MA) offered an amendment to strike the language in section 10 of the bill regarding the regulatory nature of recovery plans. The amendment failed by voice vote.

Congressman Greg Walden offered and withdrew an amendment to allow the modification of specific measures in an agreement between the Secretary of the Interior and a federal agency after considering the direct, indirect and cumulative costs and benefits resulting from the implementation of a recovery plan.

Congressman Jim Costa offered an amendment to section 10 of the bill to require the Secretary of the Interior to consult with any pertinent State, regional or local land use agency before approving a new or revised recovery plan. Chairman Pombo offered an amendment to also include the designee of a local land use agency. This amendment was adopted by unanimous consent. Congressman Rick Renzi (R–AZ) offered an amendment to the Costa amendment to include Indian tribes and to provide a definition of Indian tribes. This amendment was adopted by unanimous consent. The Costa amendment, as amended, was adopted by voice vote.

Congressman Rick Renzi offered an amendment to allow the Secretary of the Interior to enter into cooperative agreements with Indian tribes under section 11 of the bill. The amendment was adopted by voice vote.

Congressman Raul Grijalva (D–AZ) offered an amendment to strike alternative procedures for the federal agency consultation re-

quirement under section 7(a)(2) of the ESA. The amendment failed by a roll call vote of 12 to 21, as follows:

COMMITTEE ON RESOURCES
U.S. House of Representatives
109th Congress

Date: September 22, 2005

Convened: _____
Adjourned: _____

Meeting on: HR 3824 (Section 12) - Amendment offered by Mr. Grijalva.016 was NOT AGREED to by a roll call vote of 12 Yeas, 21 Nays

☐ Attendance ☒ Recorded Vote Vote Number: 12 Total: Yeas 12 Nays 21

	YEA	NAY	PRESENT		YEA	NAY	PRESENT
Mr. Pombo, CA, Chairman		✔		*Mrs. Napolitano, CA*	✔		
Mr. Rahall, WV	✔			Mr. Walden, OR		✔	
Mr. Young, AK				*Mr Tom Udall, NM*	✔		
Mr. Miller, CA				Mr. Tancredo, CO		✔	
Mr. Saxton, NJ	✔			*Mr. Mark Udall, CO*	✔		
Mr. Markey, MA				Mr. Hayworth, AZ		✔	
Mr. Gallegly, CA		✔		*Mr. Grijalva, AZ*	✔		
Mr. Kildee, MI				Mr. Flake, AZ		✔	
Mr. Duncan, TN		✔		*Mr. Cardoza, CA*			
Mr. DeFazio, OR	✔			Mr. Renzi, AZ		✔	
Mr. Gilchrest, MD				*Ms. Bordallo, Guam*	✔		
Mr. Faleomavaega, AS	✔			Mr. Pearce, NM		✔	
Mr. Calvert, CA		✔		*Ms. Herseth, SD*	✔		
Mr. Abercrombie, HI	✔			Mr. Brown, SC		✔	
Mrs. Cubin, WY		✔		*Mr. Costa, CA*			
Mr. Ortiz, TX				Mrs. Drake, VA		✔	
Mr. Radanovich, CA		✔		*Mr. Melancon, LA*			
Mr. Pallone, NJ				Mr. Fortuño, PR		✔	
Mr. Jones, NC				*Mr. Boren, OK*		✔	
Mrs. Christensen, VI				Miss McMorris, WA		✔	
Mr. Cannon, UT		✔		Mr. Jindal, LA		✔	
Mr. Kind, WI				Mr. Gohmert, TX		✔	
Mr. Peterson, PA				Mrs. Musgrave, CO			
Mr. Inslee, WA	✔			***Vacancy***			
Mr. Gibbons, NV		✔					
				Total	12	21	

Congressman Ken Calvert (R–CA) offered and withdrew an amendment which exempted from the ESA section 7(a) requirements certain agency action that may affect a species for which a permit has been issued under section 10 of the ESA if the action implements or is consistent with any conservation plan or agreement incorporated by reference in the permit.

Congressman Dennis Cardoza (D–CA) offered an amendment to change from 90 to 180 days the length of time the Secretary of the Interior has to respond to a request for a written determination of compliance with section 9(a) of the ESA. The amendment also provided a sunset for the written determination and allowed the Secretary to withdraw the determination under certain circumstances. The amendment was adopted by voice vote.

Chairman Pombo offered an amendment to clarify that the request for a written determination of compliance must apply to a proposed use which is lawful under State and local law. The amendment also required the requestor to send the request by certified mail, that the request must describe the lawfulness of the proposed action under State and local law, as well as demonstrate that the property owner has the means to undertake the use, and the request must describe the anticipated adverse impact to a species. The amendment also allows the Secretary of the Interior to request more information regarding the determination and allows the requestor to supply such additional information. The amendment was adopted by voice vote.

Congressman Jim Gibbons (R–NV) offered an amendment to allow the President, after consulting with the appropriate federal agency, to exempt any act or omission from the provisions of the ESA if the exemption is necessary for national security. The amendment was adopted by voice vote.

Congressman Jeff Flake (R–AZ) offered and withdrew an amendment regarding an exemption from liability for take of listed aquatic species.

Congressman Bobby Jindal (R–LA) offered an amendment to authorize the President to suspend the application of the ESA in a declared disaster area and directed the Secretary of the Interior to issue regulations regarding the application of the ESA in the event of an emergency involving a threat to human health or safety or to property. The amendment was adopted by voice vote.

Congressman Neil Abercrombie (D–HI) offered an amendment providing a definition of "experimental population." The amendment was adopted by voice vote.

Chairman Richard Pombo offered an amendment to section 14 of the bill to clarify the provisions regarding the distribution of aid, including the legality of the foregone use which would be subject to aid, the timing of the aid, the documentation and calculation of fair market value of the foregone use, and the availability of aid. The amendment was adopted by voice vote.

Congressman Jay Inslee offered an amendment to require that before any aid can be granted under section 14 of the bill, the property owner would also have to demonstrate that the application of ESA section 9(a) to prohibit the foregone use constitutes a taking of privately owned land for which the payment of compensation is required by the 5th Amendment of the U.S. Constitution. The amendment failed on a roll call vote of 10 to 27, as follows:

COMMITTEE ON RESOURCES
U.S. House of Representatives
109th Congress

Date: September 22, 2005

Convened: _____
Adjourned: _____

Meeting on: HR 3824 (Section 14) - Amendment offered by Mr. Inslee.086 was NOT AGREED to by a roll call vote of 10 Yeas, 27 Nays

☐ Attendance ☒ Recorded Vote Vote Number: 13 Total: Yeas 10 Nays 27

	YEA	NAY	PRESENT		YEA	NAY	PRESENT
Mr. Pombo, CA, Chairman		✔		*Mrs. Napolitano, CA*	✔		
Mr. Rahall, WV	✔			Mr. Walden, OR		✔	
Mr. Young, AK				*Mr. Tom Udall, NM*	✔		
Mr. Miller, CA	✔			Mr. Tancredo, CO		✔	
Mr. Saxton, NJ				*Mr. Mark Udall, CO*	✔		
Mr. Markey, MA				Mr. Hayworth, AZ		✔	
Mr. Gallegly, CA				*Mr. Grijalva, AZ*	✔		
Mr. Kildee, MI	✔			Mr. Flake, AZ		✔	
Mr. Duncan, TN				*Mr. Cardoza, CA*		✔	
Mr. DeFazio, OR	✔			Mr. Renzi, AZ		✔	
Mr. Gilchrest, MD		✔		*Ms. Bordallo, Guam*		✔	
Mr. Faleomavaega, AS		✔		Mr. Pearce, NM		✔	
Mr. Calvert, CA		✔		*Ms. Herseth, SD*		✔	
Mr. Abercrombie, HI		✔		Mr. Brown, SC		✔	
Mrs. Cubin, WY		✔		*Mr. Costa, CA*		✔	
Mr. Ortiz, TX				Mrs. Drake, VA		✔	
Mr. Radanovich, CA				*Mr. Melancon, LA*		✔	
Mr. Pallone, NJ	✔			Mr. Fortuño, PR		✔	
Mr. Jones, NC				*Mr. Boren, OK*		✔	
Mrs. Christensen, VI				Miss McMorris, WA		✔	
Mr. Cannon, UT		✔		Mr. Jindal, LA		✔	
Mr. Kind, WI				Mr. Gohmert, TX		✔	
Mr. Peterson, PA				Mrs. Musgrave, CO		✔	
Mr. Inslee, WA	✔			***Vacancy***			
Mr. Gibbons, NV		✔					
				Total	10	27	

Congressman Stevan Pearce (R–NM) offered an amendment regarding the reimbursement for depredation of livestock by reintroduced species. The amendment was adopted by voice vote.

Congressman Greg Walden offered an amendment which deemed certain actions in compliance with other laws to also be in compliance with section 7(a)(2) and section 9(a)(1)(B) of the ESA for a period of time. The amendment was adopted by a roll call vote of 26 to 11, as follows:

COMMITTEE ON RESOURCES
U.S. House of Representatives
109th Congress

Date: September 22, 2005

Convened: _____
Adjourned: _____

Meeting on: HR 3824 (Section 19) - Amendment offered by Mr. Walden was AGREED TO by a roll call vote of 26 Yeas, 11 Nays

☐ Attendance ☒ Recorded Vote Vote Number: 14 Total: Yeas 26 Nays 11

	YEA	NAY	PRESENT		YEA	NAY	PRESENT
Mr. Pombo, CA, Chairman	✔			*Mrs. Napolitano, CA*		✔	
Mr. Rahall, WV		✔		Mr. Walden, OR	✔		
Mr. Young, AK				*Mr. Tom Udall, NM*		✔	
Mr. Miller, CA		✔		Mr. Tancredo, CO	✔		
Mr. Saxton, NJ	✔			*Mr. Mark Udall, CO*		✔	
Mr. Markey, MA				Mr. Hayworth, AZ	✔		
Mr. Gallegly, CA				*Mr. Grijalva, AZ*		✔	
Mr. Kildee, MI		✔		Mr. Flake, AZ	✔		
Mr. Duncan, TN				*Mr. Cardoza, CA*	✔		
Mr. DeFazio, OR		✔		Mr. Renzi, AZ	✔		
Mr. Gilchrest, MD	✔			*Ms. Bordallo, Guam*	✔		
Mr. Faleomavaega, AS		✔		Mr. Pearce, NM	✔		
Mr. Calvert, CA	✔			*Ms. Herseth, SD*	✔		
Mr. Abercrombie, HI	✔			Mr. Brown, SC	✔		
Mrs. Cubin, WY	✔			*Mr. Costa, CA*	✔		
Mr. Ortiz, TX				Mrs. Drake, VA	✔		
Mr. Radanovich, CA				*Mr. Melancon, LA*	✔		
Mr. Pallone, NJ		✔		Mr. Fortuño, PR	✔		
Mr. Jones, NC				*Mr. Boren, OK*	✔		
Mrs. Christensen, VI				Miss McMorris, WA	✔		
Mr. Cannon, UT	✔			Mr. Jindal, LA			
Mr. Kind, WI				Mr. Gohmert, TX	✔		
Mr. Peterson, PA				Mrs. Musgrave, CO	✔		
Mr. Inslee, WA		✔		***Vacancy***			
Mr. Gibbons, NV	✔						
				Total	26	11	

No additional amendments were offered and H.R. 3824, as amended, was ordered favorably reported to the House of Representatives by a roll call vote of 26 to 12, as follows:

COMMITTEE ON RESOURCES
U.S. House of Representatives
109th Congress

Date: September 22, 2005

Convened: _____
Adjourned: _____

Meeting on: (Adoption of HR 3824) - Ordered favorably reported to the House of Representatives, as amended, by a Roll Call Vote of 26 Yeas, and 12 Nays.

☐ Attendance ☒ Recorded Vote Vote Number: 15 Total: Yeas 26 Nays 12

	YEA	NAY	PRESENT		YEA	NAY	PRESENT
Mr. Pombo, CA, Chairman	✔			*Mrs. Napolitano, CA*		✔	
Mr. Rahall, WV		✔		Mr. Walden, OR	✔		
Mr. Young, AK				*Mr. Tom Udall, NM*		✔	
Mr. Miller, CA		✔		Mr. Tancredo, CO	✔		
Mr. Saxton, NJ		✔		*Mr. Mark Udall, CO*		✔	
Mr. Markey, MA				Mr. Hayworth, AZ	✔		
Mr. Gallegly, CA				*Mr. Grijalva, AZ*		✔	
Mr. Kildee, MI		✔		Mr. Flake, AZ	✔		
Mr. Duncan, TN				*Mr. Cardoza, CA*	✔		
Mr. DeFazio, OR		✔		Mr. Renzi, AZ	✔		
Mr. Gilchrest, MD		✔		*Ms. Bordallo, Guam*	✔		
Mr. Faleomavaega, AS	✔			Mr. Pearce, NM	✔		
Mr. Calvert, CA	✔			*Ms. Herseth, SD*	✔		
Mr. Abercrombie, HI	✔			Mr. Brown, SC	✔		
Mrs. Cubin, WY	✔			*Mr. Costa, CA*	✔		
Mr. Ortiz, TX				Mrs. Drake, VA	✔		
Mr. Radanovich, CA	✔			*Mr. Melancon, LA*	✔		
Mr. Pallone, NJ		✔		Mr. Fortuño, PR	✔		
Mr. Jones, NC				*Mr. Boren, OK*	✔		
Mrs. Christensen, VI				Miss McMorris, WA	✔		
Mr. Cannon, UT	✔			Mr. Jindal, LA			
Mr. Kind, WI				Mr. Gohmert, TX	✔		
Mr. Peterson, PA				Mrs. Musgrave, CO	✔		
Mr. Inslee, WA		✔		***Vacancy***			
Mr. Gibbons, NV	✔						
				Total	26	12	

SECTION-BY-SECTION ANALYSIS

Section 1. Short title; Table of contents

Section 1 provides a short title for the bill—"The Threatened and Endangered Species Recovery Act of 2005"—and a table of contents.

Section 2. Amendment references

Section 2 clarifies that, unless otherwise noted, all amendments are to the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Section 3. Definitions

TESRA section 3 establishes a new definition for the ESA and directs the Secretaries of the Interior and Commerce to provide guidance and direction on the development and use of scientific data. The fundamental goal of adding this definition is to ensure that sound and defensible science is used in all relevant decisions including: a proposed listing or delisting of an endangered or threatened species; a proposal to reclassify a species from threatened to endangered or vice versa; the development of a recovery plan for an endangered or threatened species; and a biological opinion on a federal agency action.

Each agency follows a regulatory process to list species as threatened or endangered and to conserve or recover a species. Currently, the ESA requires "the best scientific and commercial data available" for listings and other actions. However, this term is not defined, and there are no objective standards to ensure a uniformly high quality of scientific data. Further, many question the cost, magnitude and validity of the ESA's requirements and implementation since the ESA has produced very limited recovery results. This has led to concerns about the adequacy of science supporting implementation of actions under the ESA. To address these issues, this definition is established and the Secretaries are to set standards for the "best available scientific data" that are used to take actions under the ESA.

TESRA section 3 also provides a new definition of "permit or license applicant" to replace the old definition that was tied to the now-repealed Endangered Species Committee exemption process. A permit or license applicant under ESA section 7 is a person who has applied to a federal agency for a permit or license or for another type of formal legal approval to perform an act, such as a bidder on a federal contract.

TESRA section 3 also defines the term "jeopardize the continued existence" of an endangered species or threatened species. The term is used in ESA section 7, under which federal agencies must insure their actions are not likely to jeopardize the continued existence of an endangered or threatened species. Under this definition, the agency action must reasonably be expected to significantly impede, directly or indirectly, the conservation of the species in the long-term. This definition strengthens the current jeopardy standard by adding to the jeopardy analysis consideration of "conservation," defined in the ESA as the use of all methods and procedures to restore a species to the point where the protections of the ESA are no longer necessary. A significant impediment to conservation is one that, by itself, makes the future use of such methods and

procedures unlikely to be successful, thus jeopardizing the continued existence of the species and risking its extinction. Before an impediment can be considered "significant," there must be sufficient scientific basis in existence at the time of the consultation, such as a recovery plan if one has been prepared under TESRA, to conclude that the conservation is possible. As provided by the definitions of "endangered species" and "threatened species" in the current ESA, a significant impediment must be likely to frustrate, directly or indirectly, conservation throughout all or a significant portion of the species' range, not just in one region or locality, although for some species an action occurring only in one such area could indirectly have significant effects in a broader area. In addition to being significant, the harmful effects of the agency action must persist over the long term, which may vary from species to species. A short-term impediment to conservation, no matter how significant, that has no lasting long-term effects would not support a jeopardy finding under the definition. To find jeopardy, it would be necessary to demonstrate that the effects would be likely to create a significant long-term threat to the ability to successfully conserve the species. Finally, this definition would consider only the conservation of the species in the wild, not taking into account, for example, captive-breeding programs or the maintenance of members of the endangered species or threatened species in zoos, aquaria, or other refuges.

This term, as it appears in section 7 of the current ESA, is not defined, and has been implemented by the Secretary through regulatory provisions. The term is also accompanied by a second standard in section 7 of the current ESA for evaluating federal actions destruction or adverse modification of critical habitat. Although the greatest threat to endangered and threatened species is habitat loss, and protection of habitat is a key concern of the ESA, the legal concept of critical habitat in the ESA has proven to be poorly understood, controversial and difficult to implement, with both the Clinton and Bush Administrations speaking out forcefully as to its cost in time and money and relative ineffectiveness as a conservation tool. Litigation over the concept's meaning and application in ESA section 7 has also increased dramatically, shifting valuable conservation resources away from on-the-ground restoration to often ineffective process costs. Reflecting these realities, the concept of critical habitat and the second standard in ESA section 7 that incorporates it have been dropped. To assure that ESA section 7 continues to give broad protection for species and habitats, the new jeopardy definition has been added so that, when a future agency action is evaluated for risk of jeopardizing the continued existence of a species, consideration is given to preserving the potential for species' conservation and not just the effect on the species' survival. Habitat will continue to be a central focus of the analysis under ESA section 7 since ultimate conservation of so many endangered and threatened species is habitat-dependent. Moreover, the amendments contained in TESRA to strengthen the recovery planning process increase the focus on habitat, since recovery plans will be required to include the identification of habitat that is of special value to the conservation of the species. This will able the recovery plan to serve a role formerly played by critical habitat to inform the public of the importance of key habitat areas. Additionally, re-

covery teams can develop plans that incentivize conservation on privately owned lands that have been subject to sound land management practices that have benefitted species but were never acknowledged under the current regulatory-based critical habitat system. Recovery plans can be given the force and effect of law if adopted through other existing authorities, and federal agencies may enter into implementation agreements with the Secretary to enforce recovery plan provisions. In any event the recovery plan should inform all discretionary decision-making under the ESA even where the obligations of the affected agencies or parties differ from the standards of a recovery plan. The Secretary's regulations will have to be updated to implement the new jeopardy definition in the wide range of circumstances that exist among endangered and threatened species.

Section 4. Determinations of endangered species and threatened species

TESRA section 4 provides that the "Secretary shall use the authority * * * to determine any distinct population of any species of vertebrate fish or wildlife to be an endangered species or a threatened species only sparingly." The Senate Report on the 1979 ESA Amendments recognized the "great potential for abuse" in providing an ability to extend the ESA's protections to a "distinct population," and directed that this authority be used only "sparingly." S. Rep. No. 96–151 at 7 (1979). TESRA elevates that legislative intent to a statutory directive.

The Committee has done so because, despite the intent in the U.S. Fish and Wildlife Service's 1996 DPS Policy to designate distinct populations only "sparingly" (61 Fed. Reg. 4722–25 (Feb. 7, 1996)), in practice the "Services have concluded that potential populations qualify as a distinct population over 80 percent of the time." Geoffroy and Doyle, Listing Distinct Population Segments of Endangered Species: Has It Gone Too Far?, Natural Resources & Env't 82, 84 (ABA Fall 2001). The Secretaries need clear direction and authority to limit the number of "distinct populations" that are found and listed. The historic overuse of that authority is diverting limited resources from more important ESA goals, is trivializing the ESA by protecting less-significant units, and is needlessly increasing the conflicts between the ESA and desired human land uses.

Section 4 of TESRA provides that in evaluating the adequacy of existing regulatory mechanisms in making a decision whether to list a species as threatened or endangered, the Secretary shall consider ongoing conservation efforts described in ESA subsection 4, and provides that such efforts include those by federal agencies as well as States, local governments and foreign nations. The amendment made by this subsection clarifies that the ESA subsection 4(b)(1) factors should be considered as part of the ESA subsection 4(a)(1) analysis rather than separately after consideration of the ESA section 4(a)(1) factors.

Section 5. Repeal of critical habitat requirements

This section repeals the critical habitat provision contained in the current ESA. TESRA eliminates critical habitat because, according to successive Democratic and Republican administrations,

the provisions cause nothing but litigation and waste resources. The official position of the U.S. Fish and Wildlife Service is:

"In 30 years of implementing the ESA, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of conservation resources. The Service's present system for designating critical habitat is driven by litigation rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The consequences of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits and to comply with the growing number of adverse court orders. As a result, the Service's own proposals to undertake conservation actions based on biological priorities are significantly delayed."

In TESRA, habitat of special value to the conservation of a species is identified and included in recovery plans and given priority in recovery contracts. Any proposal that would initiate a review of an action's effect on habitat will be reviewed under TESRA's recovery habitat, as required under the ESA section 7 consultation process. This process is described in greater detail under section 9 of the bill.

Section 6. Petitions and procedures for determinations and revisions

The Secretary's determination that a petition to list a species as endangered or threatened may be warranted can only be made if the petitioner has provided the Secretary with all information cited in the petition. TESRA section 6 also modifies the notice provisions to provide that the Governor, as well as the appropriate State agency, receives notice of a proposed listing determination or revision.

This section further provides that: (1) a complete record of all information concerning the proposed listing determination or revision must be made available on a publicly available website; (2) the posted information must include any status review and information, information referred to in the proposed regulation, and all information submitted by third parties; and (3) the Secretary must withhold any document consistent with the requirements of section 552 of the Administrative Procedure Act.

The section also provides that any withdrawal of a proposed listing determination or revision must be accompanied by written findings explaining such withdrawal, and clarifies that the emergency provisions set forth in ESA section 4 only apply to listing determinations and requires that the Governor as well as any affected State agencies be given notice. The posted information must include any status review and information, information referred to in the proposed regulation, and all information submitted by third parties. The Secretary must withhold any document consistent with the requirements of section 552 of the Administrative Procedure Act.

Section 7. Reviews of listings and determinations

This section provides that status reviews that propose a change in the species status must have taken into consideration either: (1) the objective, measurable criteria identified in the recovery plan

which, if met, would result in a downlisting or delisting decision; (2) for species with no recovery plan or established downlisting or delisting criteria, the listing determination factors under ESA section 4(a); (3) a finding of a fundamental error in the initial determination; or (4) a determination that the species is no longer an endangered or threatened species or in danger of extinction based on an analysis of the listing factors under ESA section 4(a).

Section 8. Secretarial guidelines; State comments

The ESA has had a more far reaching impact than anticipated when signed into law in 1973. It has become clear that the impacts and benefits are not just at a State level, but actually have trickled down to the local government level. In response to growing concerns by county, local and other equivalent governments on the need for greater opportunity to comment on the actions of the federal government as it manages threatened and endangered species, the Committee has extended the authority to these groups. The Committee has done this in TESRA by adding Governors, counties or units of local governments to the provisions of section 4 of the ESA.

Section 9. Recovery plans and land acquisitions

Subsections (a) and (b) of section 9 of TESRA expand upon and strengthen the ESA's provisions concerning recovery plans. In keeping with the more detailed coverage of the recovery planning process, section 10 of TESRA moves the recovery plan provisions from section 4 of the ESA, which focuses on listing and delisting of endangered species and threatened species, to a more prominent position at the beginning of ESA section 5. In effect, existing ESA section 4(f) would become ESA subsections 5(a) through (j).

Among the most significant changes that section 9 of TESRA would make to the current ESA recovery planning provisions are the following:

Section 9 would require that, for any species determined to be endangered species or threatened species after TESRA's enactment, the recovery plan must be prepared within two years after the final determination rule.

Section 9 would require that recovery plans be based on "best available scientific data." The current ESA requires use of such data in listing species and in consultations on federal agency actions, but omits the requirement for recovery plans. Given the greater attention paid to recovery plans in TESRA, such plans should also be governed by the same data standard as applies to species' listings and agency action consultations.

Section 9 also specifies in more detail requirements for the contents of recovery plans. The plans must contain objective measurable criteria that, when met, would allow a determination to delist the covered endangered species or threatened species or to downlist an endangered species to a threatened species. Measurable criteria are important because they set the goals for all other plan elements. Moreover, if and when such criteria are met, they should automatically trigger a downlisting or delisting rulemaking. Currently it is difficult to determine in many recovery plans what constitutes conditions that would warrant delisting or downlisting, or, when the plans do contain measurable criteria and they are met

or exceeded, the Secretaries fail to take any delisting or downlisting action.

The plans must also contain a description of site-specific or other measures that would achieve the criteria, including intermediate measures. Again, it is difficult to locate any discussion of practical measures in many existing recovery plans. Perhaps because they are often prepared by recovery teams dominated by academics, many of those plans emphasize research, some to the exclusion of any practical measures.

TESRA would also require that recovery plans contain estimates of the time and cost of the plans' recommended measures. Too many current plans do not provide realistic assessments of the time needed to undertake specific measures; some fail even to suggest when such measures should be initiated, thus encouraging either a rush to do everything at once or delay everything to the later years of the plans' terms. Many existing recovery plans also provide ample evidence that those who prepared them gave insufficient thought to the cost of proposed measures. The new requirements for time and cost estimates should remedy these problems and make recovery plans far more useful and realistic documents.

Finally, the recovery plans should identify areas of special value for conservation. This requirement for plan contents ensures that attention will continue to be paid to the covered species' habitat needs, even with the deletion of the current ESA's critical habitat provisions. These lands are not to be identified for the regulatory purposes that accompanied critical habitat. Rather their identification should inform, but not dictate, other decisions under the ESA. It is also hoped that these lands are given the highest priority in the implementation of any landowner incentive programs, including those authorized under the ESA currently, those authorized in this bill, and any that may be authorized in the future. The lands to be identified in any recovery plan should be those that are required to meet the delisting or downlisting criteria, and secure the delisting or downlisting determination, contained in the same plan.

Section 9 also has additional provisions refining these required plan contents. For example, it allows the establishment of "interim criteria" intended to improve the status of the covered species where insufficient best scientific data exist to permit a determination of the criteria necessary for delisting or downlisting. TESRA requires reviews at least every five years of plans containing interim criteria to ascertain whether full delisting or downlisting criteria can be established. Prompt revision of any plan is required if the data are found to be available. For species that occupy more than one State, the recovery plans are to contain criteria that, when met, would allow delisting or downlisting of the portion of the species in each of the States. Related to the cost concerns, the bill requires the recovery plans to include, whenever possible, alternative measures and the identification of the least costly measure among alternative measures of comparable efficacy. The plan is also to contain the estimate of the cost of acquisition on a willing seller basis of any of the identified special value lands. As a transition matter, any critical habitat designated prior to the bill's enactment would be treated as special value land until the relevant recovery plans are drafted or revised.

Another significant change would be the detail TESRA section 9 would add to the recovery team concept. It requires the promulgation of regulations to contain criteria for establishing recovery teams to prepare recovery plans that are diverse (including representatives of constituencies that would be affected favorably by the plans' goals of, and contents to effect delisting or downlisting, and constituencies that could be economically or socially impacted by implementation of those goals and contents) and can achieve timely completion of the plans. Broadening the teams' membership will ensure those most directly affected by the plans have a voice in their preparation. They may also supply new insights, particularly concerning land and water management constraints and opportunities. These additional insights will be particularly valuable in devising the recommended measures. Although TESRA provides that only scientific members of the recovery teams are to establish the delisting or downlisting criteria, any of the broader constituencies can select scientists as their representatives who would participate in the criteria-setting process. The recovery team regulations also are required to ensure that the plans are scientifically rigorous and, where costs analyses are required, economically rigorous. Finally, those regulations are to provide guidelines as to when the appointment of recovery teams is unnecessary.

TESRA section 9 also adds language that will make the Secretaries' biennial report to Congress more informative and a better gauge of performance under the ESA. Moreover, new provisions attempt to make the planning process be more transparent and open by providing for review and comment by the affected States, Indian tribes, regional or local land use agencies, and the public.

The new recovery plan provisions in section 9(a) of TESRA also makes explicit what is implicit in the current ESA section 4(f) recovery plan language—the intended effect of the recovery plan. The paragraph is also fully consistent with long-held federal judicial precedent interpreting that intended effect. Consistent with Fund for Animals v. Rice, 85 F.3d 534, 547 (11th Cir. 1996),[2] TESRA states that the recovery plan does not impose any regulatory requirements on federal agencies and nonfederal persons. As stated elsewhere in this report, recovery plans are intended to inform, but not dictate, relevant decision making under the ESA. That recovery plans do not have the force and effect of law not only is the law, given the absence of any direction to the contrary in the current recovery plan language in current section 4 of the ESA and the consistent interpretations by all Administrations and by the courts, but also is a matter of practical necessity. As a practical matter, the recovery plan cannot have such force and effect because it is prepared on the basis of statutory standards (both those in the current ESA section 4 and in the new section 5 language of TESRA) that are more stringent than the statutory standards for most other decisions under the ESA, e.g., consultation on federal agency actions under ESA section 7 and approval of incidental take permits and safe harbor agreements under ESA section 10.

The Committee did adopt an amendment that eliminated a phrase which stated recovery plans can have no "effect other than

[2] "[T]he practical effect of the Plaintiffs' position would be to elevate the * * * Recovery Plan into a document with the force of law. We cannot take such an approach. Section [4(f)] makes it plain that recovery plans are for guidance only."

as non-binding guidance." In point of fact, they can have binding effect if a federal agency decides to adopt all or part of any specific plans (and the adoption of those provisions does not have the effect of exceeding the limits of authority provided by the ESA to impose the restrictions that may be contained in those provisions, particularly on non-federal entities or landowners) or if the nonfederal entities or landowners voluntarily choose to adopt such provisions in cooperative agreements, habitat conservation plans, safe harbor agreements, etc. After such adoption, the conservation plan provisions would then become binding either under the ESA or under contract law.

TESRA section 9 also explicitly allows a federal agency to agree to undertake particular identified measures in any specific recovery plan through an agreement with the Secretary of the Interior and/or the Secretary of Commerce. Each agreement is to be focused on particular measures in a specific recovery plan. This provision requires that any recovery plan-specific agreement be made subject to public review and comment, and that the Federal agency responds to the public comment. Moreover, the Committee does not intend that any agreement waive, alter, or encumber any public participation, administrative appeal, or due process requirements contained in the laws and implementing regulations that authorize and govern agency activities covered by the agreement.

Finally, TESRA section 9 provides for the development of priorities and a schedule for development of recovery plans for species listed prior to the bill's enactment that do not yet have such plans.

The two landowner incentives programs included in the section 9 of TESRA are intended to provide alternative mechanisms to those contained in current programs for landowners to secure immunity from liability under the ESA while providing additional habitat and protection for endangered and threatened species on nonfederal lands. Currently there are several incentive programs (e.g. the habitat conservation planning and incidental take permitting process under ESA section 10) that are explicitly authorized, and several more incentive programs (e.g. safe harbor agreements and candidate conservation agreements) that are not authorized by the ESA. There are also landowner incentive programs under other statutes, e.g. the Forest Legacy Program. The programs established in this bill are not intended to be additive. They, instead, are expected to provide a wider array of alternatives for landowners who would otherwise have made use of the existing programs. The new programs simply provide standards and procedures that landowners already inclined to enter a landowner incentive program may find better tailored to their needs.

Section 10. Cooperation with States and Indian tribes

These provisions strengthening ESA section 6 State cooperative agreements are responsive to the repeated requests of the States, particularly the Western Governors' Association, to be accorded the opportunity to participate more actively and fully in species conservation efforts. The States' participation is critical because they know their residents' needs better (and the residents know the States better) than the Secretaries of the Interior and Commerce, and, consequently, the States are likely to be far more effective in enlisting landowners in the cause of species' conservation.

A number of States, with active encouragement of the Secretary of the Interior, are seeking to make greater use of the cooperative agreement provisions of ESA section 6. In the past many States chose to prepare and submit bare-bones cooperative agreements applicable to all listed species within their borders. The principal purpose of such agreements was to secure Federal funding. Recently several States have prepared or are in the process of preparing cooperative agreements for particular species that are far more detailed, containing very specific land and water management guidance and requirements to protect those species. Often these species-specific agreements provide for the voluntary enrollment of landowners, who are then bound to the agreements' terms by contract. The advantage to enrollment is that the landowners secure the protection of the incidental take statement that the Secretaries may issue after consulting under ESA section 7 on approval of the relevant agreement. The broader agreements come under the provision of ESA section 6 concerning agreements "to conserve resident species * * * determined by the State agency or the Secretary to be endangered or threatened." The species-specific agreements come under the provision of ESA section 6 concerning agreements that contain "plans" which address resident endangered or threatened species" which the Secretary or the State agency agree are most urgently in need of conservation programs. These agreements not only secure the enlistment of States and landowners in the efforts to conserve listed species, but also reduce the strain on the species conservation resources available to the Secretaries and Federal land management agencies.

Section 10 of TESRA strengthens and broadens the ESA's section 6 conservation agreement authority in several ways. First, it encourages agreements to address candidate species by providing that the incidental take statement will cover those species if and when they are listed. Second, it amends the Federal funding provision to authorize the Secretary to provide financial assistance for agreements that establish conservation programs for the protection of, and are not just limited to monitoring, candidate species, as well as other species at risk and species that are determined by the Secretary to be recovered species and no longer subject to the constraints of the ESA.

Third, TESRA section 10 eliminates a significant barrier to the completion and implementation of these agreements. ESA section 6 currently requires that these agreements be reviewed annually. As each annual review could be considered a Federal agency action, the agreements, the States, and the Secretaries could become mired in an increasingly larger number of annual consultations, particularly if section 10's intended effect of stimulating the States to produce multiple cooperative agreements is effective. TESRA section 10 addresses this problem by changing the annual reviews to triennial reviews, and specifying the circumstances in which additional consultations must occur on agreements after the initial consultations on the agreements' approvals. Those circumstances are, in brief, whenever the Secretaries determine, during the reviews or on obtaining new information, that the agreements may be having any "adverse effects" on the covered species that had not been considered previously or whenever either Secretary approves

the renewal or amendment of an agreement that covers or affects newly listed species.

Fourth, TESRA section 10 contains a provision that clarifies that any cooperative agreements that call for the enrollment of lands or water rights in the agreements' conservation programs may not require enrollment and must ensure that any enrollment is voluntary.

Fifth, TESRA section 10 adds provisions to ESA section 6 that specify procedures for suspension and termination of cooperative agreements, including procedures for curing deficiencies. The current ESA section 6 is silent as to how the Secretaries may address cooperative agreements that no longer meet the requirements of ESA section 6 or are found in consultations to likely jeopardize the covered species' existence.

Finally, the Committee adopted an amendment to accord to Indian tribes the same authority to enter into cooperative agreements that ESA section 6 now provides to the States. Indian tribes with the capacity and desire to prepare species conservation programs should be encouraged to do so. This amendment would provide such encouragement.

Section 11. Interagency cooperation and consultation

This section of TESRA adds to the current ESA section 7 language which authorizes the Secretary to adopt by regulations alternative procedures to those described in other provisions of ESA section 7 to implement ESA section 7's jeopardy standard for Federal agency actions. The paragraph has a number of safeguards to ensure that the regulations cannot alter the jeopardy standard, and that they will require virtually equivalent procedures to those in the current ESA provisions for agency actions which are likely to adversely affect listed species.

In effect, the Secretaries have already exercised this authority in the regulations they adopted in 1986 (50 CFR Part 402). Under those regulations, over the last two decades countless Federal agency actions have been allowed to proceed without any "consultations" by the Federal action agencies with the Secretaries, and without the preparation of any biological "opinion[s]" by the Secretaries on those actions, using the procedures in the regulations for "informal consultation." Yet, since 1979, ESA section 7(a)(2) has referred to "consultation" on "any [agency] action," ESA section 7(b)(1) has set deadlines for concluding "consultation" on "any agency action," and ESA section 7(b)(3) has required the preparation by the "Secretary" of a written biological "opinion" "after conclusion of consultation under" ESA section 7(a)(2), which is not prepared in an informal consultation.

The 1986 rules have allowed such informal consultation with the Secretaries for all agency actions that the Federal action agencies (e.g., Corps of Engineers, Bureau of Land Management, Bureau of Reclamation, and Department of Transportation) determine are not likely to adversely affect listed species, with only a brief written concurrence from the Secretary rather than a biological opinion. Moreover, those same regulations have excused any communication by an action agency with the Secretary for "no effect" agency actions. The 1986 regulations also authorize the further adoption of additional regulations that establish other alternative "consulta-

tion" procedures for categories of Federal agency actions (50 CFR 402.04), which the Secretary has done twice.

The new language added to section 7 puts into the ESA both authority to adopt alternative "consultation" procedures which the Secretary exercised in promulgating in the 1986 regulations for informal consultation, and authority to devise additional alternative "consultation" procedures tailored to particular agencies or agency actions as exercised twice previously. This new language would constrain these alternative procedures authorities in several ways. First, it does not alter the ESA section 7 substantive jeopardy standard for agency actions. Second, it allows the adoption of alternative "consultation" procedures only by notice-and-comment rulemaking, and only by the Secretaries who have the duty to protect listed species, not the Federal agencies proposing the agency actions. Third, it maintains all the key requirements of the current ESA section 7 statutory procedural steps for agency actions that may adversely affect listed species.

Under the current statutory procedures, the only way that a Federal action agency (and any applicant for a Federal permit, license, funding, etc.) can obtain immunity from adverse effects to a listed species caused by an agency action is to obtain an incidental take statement from the Secretary under ESA section 7(b), after consultation with the Secretary under ESA section 7(a) and preparation by the Secretary of a biological opinion under ESA section 7(b). Under the new paragraph, if any agency action has the likelihood of adversely affecting a species, the agency (and the applicant) will still have to seek consultation with the Secretary, and the Secretary's preparation or concurrence in a biological opinion, to obtain the protection of the issuance of an incidental take statement. Also, under current ESA law, if the agency action's adverse effects are significant enough to fail to meet the ESA section 7(a) jeopardy standard, the Federal action agency (and applicant) for all intents and purposes only can proceed, and only can secure an incidental take statement, if it engages in consultation with and obtains a biological opinion from the Secretary, and agrees to undertake a "reasonable and prudent alternative" to the action suggested by the Secretary under ESA section 7(b). Under this new language, the same steps—consultation, biological opinion, Secretarial suggestion of or concurrence in a reasonable and prudent alternative—would have to occur and could not be avoided by any alternative procedure established under the new language.

Section 11 of TESRA adds a new provision to ESA section 7(a) providing that any analysis under ESA section 7(a) shall consider only the effects of the proposed agency action under review that are distinct from the baseline of effects on the relevant species that have occurred or are continuing to occur as a result of past human activities or natural events. The ESA section 7(a) analysis is to determine the incremental effects of a proposed Federal agency action. Federal actions such as the ongoing operation of existing facilities cannot be expected to compensate for past activities or events in many cases occurring long before the ESA was originally enacted. Thus, this section provides that a jeopardy finding under ESA section 7(a) as amended would have to be based only on the incremental effects of the proposed action and not on pre-existing conditions.

TESRA would establish a requirement in new ESA section 7(b) that any terms and conditions in the Secretary's written statement following consultation must be "roughly proportional" to the extent that the land use activity results in incidental take of a species. Similarly, under new ESA section 10(a)(3), terms and conditions in a ESA section 10 incidental take permit and habitat conservation plan must be "roughly proportional" to developmental impacts on listed wildlife. This "roughly proportional" language clarifies the intent of the two provisions to provide for mitigation of project or development impacts. Indeed, the "roughly proportional" language is modeled after similar language contained in the rigorous State of California Endangered Species Act (Cal. Fish & Game Code 2052.1, 1081(b)).

The "rough proportionality" language is also intended to codify the principle from Dolan v. City of Tigard, 512 U.S. 374, 391 (1994), in which the Supreme Court recently recognized that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property." Lingle v. Chevron, U.S.A., 125 S.Ct. 2074, 2087 (2005) (citing Dolan, 512 U.S. at 385).

Dolan stands for the proposition that government can only demand conditions on land use activity that are tailored to address the particular impacts that will accrue from the project under review. As the Court stated, "no precise mathematical calculation is required, but the [government] must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." Id. at 391. Under Dolan, it is the government's burden to prove "rough proportionality" between species impacts and the proposed development. Accordingly, for purposes of TESRA, the Secretary must quantify his or her findings for ESA sections 7 and 10 terms and conditions as much as possible. The Secretary cannot rely on conclusory statements regarding hypothetical impacts of a project as justification to impose excessive conditions on private land use activities to address the incidental take of species. In short, the government must develop a sufficient administrative record to justify terms and conditions under the "rough proportionality" standard.

Section 12. Exceptions to prohibitions

In adding paragraph (4)(E) to ESA section 10(a), it is the intent of the Committee to confirm the validity of the "No Surprises" and Permit Revocation regulations that have governed ESA section 10(a) permits for the last seven years, and to require the inclusion of "No Surprises" and Permit Revocation assurances in future permits. To this end, new ESA section 10(a)(4)(A) through (E) enacts "No Surprises" and Permit Revocation assurances and requires that these assurances be included in all future ESA section 10(a) permits, except permits issued for scientific purposes. For ESA section 10(a) permits issued before the date of enactment, new ESA section 10(a)(4)(E) makes clear that the existing "No Surprises" and Permit Revocation regulations, codified in 50 CFR Parts 17.22 and 17.32, constitute the governing law pursuant to which existing permits will be implemented and enforced.

Under TESRA, the habitat conservation plan content (HCP) requirements—the biological goals, monitoring, and adaptive management provisions—are NOT new, but are taken from an existing policy implemented in 2000. All three elements of HCPs were established in 65 Fed. Reg. 35242–35257 (June 1, 2000) ("Notice of Availability of a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting"). These new statutory requirements are not intended to go beyond the existing notice provisions and therefore are not more stringent.

TESRA also amends the ESA section 10(j) provisions to advance recovery while respecting property rights and other local concerns. Such solutions have been worked out under the existing law, which allows rules for introduced species to be tailored to local conditions, and the committee intends to facilitate more such solutions. The Committee finds that application of section 10(j) of the ESA can provide clear benefits to endangered species as demonstrated by the California condor recovery in northern Arizona and southern Utah where recovery actions have involved and are supported by States, Tribes, local communities, and private landowners. The Committee desires to clarify and improve this provision.

Application of section 10(j) of the ESA requires the Secretary to make two determinations before establishing an experimental population. Those are: (1) that doing so will "further the conservation" of the species; and (2) that there are no naturally occurring populations of the same species in the area where the experimental population is to be established. A point of confusion has been the meaning of "population" when considering appropriateness for establishment an experimental population. The Committee believes that periodic sightings and even occasional breeding are insufficient to be considered a natural population, and that such sightings are no bar to the establishment of an experimental population.

Consequently, TESRA revises ESA subsection 10(j)(1) to clarify this point of confusion and potential controversy by describing the term "areas occupied by nonexperimental populations" as "areas characterized by the sustained and predictable presence of more than negligible numbers of successfully reproducing individuals over a period of many years." Endangered and threatened species conservation will benefit as this clarification will firmly establish those circumstances where the section 10(j) provision may be used and reduce the potential for conflict which has often resulted in litigation.

TESRA also provides for a written determination of compliance provision that would become subsection 10(k) in the ESA. This provision affords a property owner the means of receiving a final agency determination whether a proposed property use would be in violation of the ESA section 9(a) prohibitions. The most important of these prohibitions is that against the "take" of a species. As defined in the ESA, "take" includes the elements "harm, harass, pursue, hunt, shoot, wound, kill, trap, capture or collect" with regard to an endangered species or, by prohibitions promulgated in regulations, of a threatened species. While most of the actions that constitute a take require a direct relation between the person committing the take and the species the elements "harm" and "harass" may provide for a proximate relationship. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 713–714, 115

S.Ct. 2407,2420–2421 (1995). Consequently, a use that a reasonable person might conclude as not violating this prohibition may do so.

TESRA's provision that provides for a written determination affords landowners certainty regarding a proposed use of their property and, in the case the Secretary determines that the use would not comply with the current ESA's prohibitions against take of a listed species, it provides for a written determination that may serve as the basis for a request for conservation aid to offset the burden of conservation measures imposed upon the property owner.

The newly created section 10(k) provides that a property owner who desires a determination by the Secretary whether a proposed use would violate the ESA's section 9(a) prohibitions may request, by certified mail, such a determination provided that the property owner describe: (1) the nature, location, anticipated schedule and duration of the proposed action; (2) lawfulness under State and local law; (3) the property owner's means to carry out the proposed use; and (4) anticipated adverse impacts to a listed species is expected to occur. Under section 10(k)(3) the Secretary may request and the property may provide any other information either believes will aid the Secretary in making a determination. Section 10(k)(4) provides that the Secretary may make no determination if the property owner requesting the determination failed to include information required under section 10(k)(2) and allows, in such a circumstance, that the property owner may resubmit the request.

Provided with the information under section 10(k)(2), the Secretary must, pursuant to section 10(k)(5), provide a written determination within 180 days unless a written extension is granted by the requesting party. The Secretary may extend the deadline by 180 days if the Secretary determines that he or she cannot make a determination because of seasonal considerations which would include such considerations as migration patterns and dormancy. If the Secretary fails to issue a determination within the required window, pursuant to section 10(k)(6), the proposed use is deemed to be in compliance with ESA section 9(a).

Subsection 10(k)(8) provides that uses of the property or other actions taken in reasonable reliance upon a written determination which finds the use would not violate ESA section 9(a) prohibitions or that are deemed to comply with section 9(a) based upon the Secretary's failure to respond are not subject to liability for violations of ESA section 9. Subsection 10(k)(9) limits the time period a landowner can rely on the Secretary's determination or failure to respond to ten and five years respectively. The Committee intends that reasonable reliance tests allows for variation of the proposed use when it is undertaken by the property owner so long as the nature of the use is essentially of the same scope, scale and area as the proposed use.

Under subsection 10(k)(10) the Secretary may withdraw a determination of compliance if, as a result of unforeseen circumstances, the continuation of the use would preclude conservation measures essential to the survival of an endangered or threatened species. This provision accounts for the possibility a species was newly discovered to be in the area affected by the use or a species that would be affected by the use is added to the endangered species list. Such withdrawals become effective ten days after a property

owner has been notified of the withdrawal and make the property owner eligible for aid equivalent to the fair market value of the foregone use.

Pursuant to section 10(k)(7), property use that is subject to consultation under ESA section 7 consultation cannot be the subject of a request for a written determination of compliance as the ESA provides an assessment of the effect of an agency action on listed species under ESA section 7's consultation provisions.

TESRA provides reasonable requirements to prevent abuse of this determination authority. For example, a property owner requesting a determination must include basic information about the proposed use such as the use's consistency with State and local law, the property owner's means to undertake the proposed use and any reasonably anticipated adverse impacts to a species included on the lists published under the current ESA section 4(c). Given that this section is provided in large part to reduce conservation burdens imposed on private property owners, the Committee does not intend for these requirements to impose yet another burden on private property owners. Accordingly, TESRA neither imposes any requirement on nor provides any authority for the Secretary to require a property owner to obtain and provide completed State and local permits or approval from any other governmental agency to be eligible for a written determination. Similarly, TESRA imposes no requirement on the property owner nor provides the Secretary with authority to require that detailed or extensive financial, design or other such information be provided by a property owner to demonstrate the means to undertake the proposed use. Likewise, in assessing "anticipated adverse impacts" TESRA does not require nor provides the Secretary with authority to require the property owner to provide detailed studies, analyses or surveys. Rather, the intent of these provisions is to require a good faith effort on behalf of the property owner to provide the Secretary with relevant information to make a determination.

Finally, because this provision is intended to assist property owners who, in many instances, may not even know of the existence of an endangered or threatened species in the vicinity or that their particular activity (e.g., farming, forestry, home building) may impact an endangered or threatened species, the failure of any property owner to request a written determination under this subsection should not count against the owner in any legal proceeding or permit process.

Section 13. Private property conservation

Section 13 of TESRA would replace section 13 of the ESA which consists of amendments to other laws that have been executed. Section 13 provides two additional mechanisms to the ESA, conservation grants and conservation aid. This section affirms that the Committee places the conservation of endangered and threatened species among the highest of priorities and that TESRA evidences the Committee's recognition that the burden of carrying the costs of a conservation program that is intended to benefit all should not be borne by the few. The conservation aid provisions are at the heart of improvements the Committee considers essential to modernize and update the ESA. It is designed to compensate private property owners who have been denied use of their property as evi-

denced by a written determination that the owner's proposed use of the property would violate the ESA prohibitions at section 9(a) (or a withdrawal of a written determination of compliance). Providing such a mechanism not only reflects the societal commitment to conservation of endangered and threatened species but also reduces the unintended and counterproductive consequence of devaluing private property through regulations. Without such a provision, the actual effects of a law designed to conserve endangered and threatened species can be the destruction of habitat or the species itself compelled by the potential threat to the value of private property.

Under new ESA section 13, the Secretary may issue conservation grants to promote conservation of endangered species and threatened species on private property. This authority is intended to complement other tools at the Secretary's disposal under the ESA and that would be provided by TESRA. Subsection (b) provides basic restrictions on grants prohibiting their use to fund litigation, general education, general outreach, lobbying or solicitation. It also prohibits use of grants for land acquisition or leases or easements of more than 50 years and requires that any grant activities carried out on private property are supported by the property owner. Subsection (c) establishes a priority ranking to guide the Secretary's decision to award grants, giving top priority to grants that promote conservation of endangered species or threatened species on private property while making economically beneficial and productive use of the property. The Committee's intent is for grants provided under this section of TESRA to be directed to producing tangible and direct conservation benefits for endangered and threatened species but to also allow the Secretary room for ingenuity and creativity in forming partnerships with private landowners and others.

Subsection (d) establishes the eligibility requirements for conservation aid that the Secretary provides under TESRA. To be eligible, property owners who received a written determination indicating the proposed use would violate ESA section 9(a) or had written determination of compliance withdrawn under section 10(k) must request aid with 180 days. Additionally, the property owner must have foregone the proposed use or, in the case of a withdrawn written determination, terminate activities that would fall under the withdrawn compliance determination when such withdrawal became effective. Further, the proposed use, as in the case of request for a written determination, must be one the property owner has the means to carry out and the use must be one that would be lawful under State and local law. These later requirements reiterate requirements that property owners need to meet to receive a written determination under section 10(k), and the Committee's intent is identical to their applicability under that provision.

Subsection (f) establishes the means of documenting the foregone use, or, alternatively, the mechanism by which the Secretary shall acquire an interest in the property. The provision provides that the Secretary shall enter into negotiations with the property owner regarding the possible means of documenting the use which may include contracts, leases, easements or acquisition or transfer of title. If the agreement is not reached within 60 days of the request for aid, then the Secretary must select the means by which foregone

use will be documented, selecting the means "with the least impact of the ownership interests of the property owner necessary to document the use." The Committee clearly intends and interprets this provision as forbidding the Secretary, after failing to reach agreement with the property owner on a means of documentation from determining that title transfer will be used as the means of documenting the foregone use. Transfer of title is excluded as a means of documenting the foregone use as it would have the greatest impact on the ownership interests of the property owner. While the Committee is unaware of instances in which the application of section 9(a) prohibitions has resulted in removal of all uses of a property, the option of transfer of title is provided during the initial 30 day negotiation period. In conjunction with the baseline that the aid provided by the Secretary be "not less than the fair market value" of the foregone use, this provision allows, with the property owner's agreement, acquisition of a larger interest in the property than would otherwise occur with aid equivalent to the fair market value of the use of the affected portion of the property which has been foregone.

Subsection (g) establishes that fair market value of the foregone use means what a willing buyer would pay to a willing seller in the open market for the affected property interest, here the foregone use that is documented under paragraph (f). *See* e.g. U.S. v. Miller, 317 U.S. 369, 374 (1943) ("market value is what a willing buyer would pay in cash to a willing seller.") Fair market value should take into account reasonably potential uses of the affected property, taking into account the likelihood and difficulty of obtaining permits for any particular use. Thus, section 13 further states that "Fair market value shall take into account the likelihood that the foregone use would be approved under State and local law." Fair market value should also not be affected by the influence of the ESA itself. The Supreme Court has held that under the "scope of the project rule," determinations of fair market value usually do not take into account impacts on value caused by the government action that gives rise to the government's liability in the first place. *See* e.g. Almota Farmers Elevator & Warehouse Co. v. U. S., 409 U.S. 470, 478 (1973) ("It [government] may not take advantage of any depreciation in the property taken that is attributable to the project itself."). Thus, the Committee does not intend that a reduced ability to use the property because of the direct or indirect influence of the ESA should affect the determination of fair market value.

To establish fair market value, after the means of documentation of the foregone use has been determined, the Secretary and the property owner are to jointly select two licensed independent appraisers. If these appraisers are unable to reach resolution as to a fair market value of the foregone use within 180 days, a third appraiser is jointly selected by the property owner and the Secretary, who establishes the fair market value within an additional 90 days. This is binding on the Secretary and the property owner.

Subsection (e) establishes a schedule by which the Secretary is to provide aid and grants provided under this section. The Secretary is to provide aid within 180 days of the request for aid if there are not unresolved issues regarding the fair market value or at the resolution of any issues regarding fair market value which

shall be accomplished in no more than 360 days from the date of the request. Aid is paid in order of the date of request. Grants are to be paid on the last day of the fiscal year.

Subsection (h) provides a provision to guard against abuse of the section by prohibiting a person from receiving aid for the same forgone use, on the same property for the same period of time, more than once.

Under subsection (i) annual reports are to be submitted on January 15 to the Committee on Resources of the House of Representatives and the Environment and Public Works Committee of the Senate for all aid and grants paid by the Secretary during the previous year.

Section 14. Public accessibility and accountability

TESRA's section 14 add a new requirement to the ESA that the Secretary maintain a publicly accessible website that includes: (1) endangered and threatened species lists; (2) all final and proposed endangered and threatened species regulations issued under ESA section 4; (3) draft and final recovery plans; (4) the results of five year status reviews; and (5) all reports and supporting data to Congress required under what would be ESA section 5 and the annual cost analyses under ESA section 18. Much of this information is provided now by the U.S. Fish and Wildlife Service on its Threatened and Endangered Species Database System. This provision codifies this as a requirement for the Secretary and specifies the information to be contained. Given the increased emphasis within TESRA on recovery plans and the important role of the five-year review provision requiring these materials to be easily accessible to the public, this provision is viewed as essential by the Committee. In providing these requirements within TESRA the Committee's intent is not merely that these documents be eventually made available on the website, but that preparation of these documents should be done with the intent that they become immediately available in electronic format as soon as they are complete and finalized. Further, the Committee expects that the requirements of this section and TESRA's amendments to ESA section 4(b) requiring the Secretary to make "available a complete record of all information concerning the determination or revision" would be addressed in an integrated manner with this section's requirements.

TESRA section 14 provides a new requirement to include on the publicly accessible website a database that may be searched by the variables contained within the reports to Congress on the status of domestic endangered and threatened species and efforts to develop and implement recovery plans for these species which are required by TESRA's amendment to section 5 of the ESA and the annual cost analyses prepared under TESRA's section 16. Both of these reports are, with similar parameters, required under current law and that information would be required to be included in the database as well. This provision would merge the largest available data sources on the conservation effects of and costs of implementing the ESA into one location, providing the public with a greater understanding of this conservation program.

Section 15. Annual cost analyses

TESRA section 15 modifies the reporting under the current ESA section 18 in several ways to provide consistent and more comprehensive reporting of costs associated with implementing the ESA. The existing law requires the reporting of expenditures that are primarily for the conservation of an endangered or threatened species on a species by species basis. In practice, many costs related to endangered and threatened species cannot be easily segregated on a species by species basis as conservation measures may benefit more than one species. Under this section, federal and State costs that are not attributable to a specific species are to be reported. Although not currently required by law, such reporting has been implemented in recent years as "other ESA" expenditures. Codifying this practice as a requirement will ensure that more comprehensive cost data is provided and that reporting is systematic from year to year.

The Committee intends for this report to provide as comprehensive a picture of ESA expenditures as possible so that the societal commitment to endangered and threatened species conservation can be more accurately tracked. Consistent with this, the Committee expects the reporting by federal agencies, such as the Forest Service and the Bureau of Land Management, to include foregone revenue as the Bonneville Power Administration has been consistently reporting.

TESRA also provides for a requirement to establish a prerequisite for eligibility for financial assistance under ESA section 6. Under this provision a State must report its expenditures on endangered and threatened species, including those expenditures that are not attributable to a specific species for the previous year, to be eligible for section 6 funding in the following year. The intent of this provision is, again, to provide as comprehensive a picture of ESA expenditures as possible. The Committee interprets this provision as requiring not only the reporting of costs borne by State fish and wildlife agencies or departments of natural resources but also those costs borne by other State agencies such as transportation departments.

TESRA also requires the Secretary to provide a means where units of local government may, voluntarily, report and certify the accuracy of costs attributable to the conservation of endangered and threatened species. This provision as well reflects the Committee's intent to provide as comprehensive a picture of ESA costs as possible and the Committee's recognition that many of the costs associated with the ESA are borne by local government. The Committee expects that in providing the means to electronically report and certify the accuracy of these expenditures, the Secretary is to make the system user friendly so that local governments are not discouraged by an additional burden.

Section 16. Reimbursement for depredation of livestock by reintroduced species

This section authorizes the Secretary, through the Director of the U.S. Fish and Wildlife Service, to reimburse the owner of livestock for any loss of such livestock resulting from depredation by any population of a species listed under the ESA and includes or derives from members of the species that were reintroduced into the

wild. Eligibility under this section is not conditioned on the presentation of the body of any animal for which reimbursement is sought. The Secretary is authorized to accept and use donations of funds to pay reimbursement under this section.

Section 17. Authorization of appropriations

This section authorizes such sums as are necessary for Fiscal Year 2006 to 2010 for the Secretary of the Interior. It also authorizes sums as necessary for Fiscal Year 2006 and 2010 for the Secretary of Agriculture to carry out functions and responsibility of the Department of the Interior with respect to the enforcement of the ESA and the convention which pertains to the importation of plants.

Section 18. Miscellaneous technical corrections

This section makes miscellaneous corrections to other portions of the ESA to correct cross references and to conform the text with the amendments made by earlier portions of the bill, as well as to provide gender neutral references within the text of the ESA.

Section 19. Clerical amendment to table of contents

This section makes a technical change to conform the table of contents of the ESA to changes made in earlier portions of this bill.

Section 20. Certain actions deemed in compliance

Section 20 of TESRA addresses a significant action taken by the Secretaries and the Environmental Protection Agency to remedy the alleged failure of the government (and, as a consequence, manufacturers, and farmers, utilities, mosquito control districts, and other applicators of pesticides) for over three decades to comply with ESA section 7(a)(2) in the registration and use of pesticides under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA, 7 U.S.C. 136–136y). ESA section 7(a)(2) requires federal agencies to consider, and consult with the Secretaries on the effects of federal agency actions on endangered or threatened species. On August 5, 2004 (69 Fed. Reg. 47732–47762), following coordination with the Environmental Protection Agency and the U.S. Department of Agriculture, the Secretaries published a joint rule (50 CFR Part 402, Subpart D) establishing procedures to ensure ESA section 7(a)(2) compliance for regulatory actions under FIFRA.

Critics have alleged that the FIFRA pesticide registration program has never complied with the requirements of the ESA, and that no Administration since the ESA's enactment in 1973 has developed a program to ensure compliance. Congress addressed this problem as early as 1988 when it enacted section 1010 in the 1988 ESA Amendments Act, which directed all involved federal agencies to design a FIFRA/ESA compliance program to "minimize the impacts to persons engaged in agricultural food and fiber commodity production." Public Law 100–478, section 1010(b), 102 Stat. 2313–14 (1988), 7 U.S.C. 136a note. The alleged continued absence of a comprehensive ESA compliance program for FIFRA actions has prompted significant litigation over the last three years. On January 30, 2004, the Secretaries proposed a rule that would establish the comprehensive ESA compliance program for FIFRA actions. In a bipartisan letter sent to the Secretary of the Interior on June 25,

2004, 92 members of the House of Representatives praised the decision to establish a compliance program and urged prompt publication of a final rule, which occurred less than a month and a half later.

The August 5, 2004, rule which established specific procedures to ensure that FIFRA actions comply with the ESA section 7 consultation requirements was promulgated under the authority of the Secretaries' 1986 general consultation regulations. The 1986 regulations authorized the development of alternative rules focused on certain federal agency actions that may benefit from ESA implementation procedures specifically tailored to those actions. The new 2004 rule constitutes such a focused regulation for ESA compliance on FIFRA actions, consistent with the 1988 ESA Amendments Act. However, the procedures mandated in the ESA compliance program established by the new rule will take some time to complete for all registered pesticide products (675 primary products) and all listed species.

Section 20 of TESRA was adopted by the Committee to give the affected agencies breathing room to properly implement the new rule. It states that, for a specific period of time, satisfaction of FIFRA's rigorous requirements for collection and submission of scientific data and scientific review of ecological risks (including effects on wildlife and ESA listed species) will constitute, for registration and use of any particular pesticide, compliance with the ESA's consultation and "take" avoidance requirements. So as to ensure expeditious proceedings under the new rule's ESA compliance program, the amendment is effective only for a period of five years or until the pesticide undergoes those proceedings, whichever is earlier. Moreover, TESRA's section 20 states that it may not affect any court order or settlement. The Committee expects that all of the currently filed litigation should be settled or concluded before enactment of TESRA; indeed, half of the cases filed to date have already been settled or concluded (and orders issued). This section 20 will ensure that use of pesticides critical for control of pests, disease vectors, and destructive invasive plants and animals, and for protection of food and fiber production, will not be terminated or compromised, and that manufacturers, and farmers, utilities, mosquito control districts, and other users will not be at risk of violating one environmental law (ESA) while complying with another (FIFRA) during implementation of the 2004 rule adopted to remedy the alleged three-decade-long non-compliance by federal agencies.

Committee Oversight Findings and Recommendations

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

Constitutional Authority Statement

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact this bill.

COMPLIANCE WITH HOUSE RULE XIII

1. *Cost of Legislation.* Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that Rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

2. *Congressional Budget Act.* As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, credit authority, or an increase or decrease in revenues or tax expenditures. According to the Congressional Budget Office, enactment of this bill could total less than $10 million over the 2006–2010 time period in direct spending.

3. *General Performance Goals and Objectives.* As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill is to amend and reauthorize the Endangered Species Act of 1973 to provide greater results conserving and recovering listed species, and for other purposes.

4. *Congressional Budget Office Cost Estimate.* Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

H.R. 3824—Threatened and Endangered Species Recovery Act of 2005

Summary: H.R. 3824 would amend the Endangered Species Act (ESA) and authorize appropriations to the Department of the Interior (DOI) and the Department of Agriculture of whatever amounts are necessary to carry out the act through 2010. The bill also would create new financial assistance programs and provide statutory authority for certain other grants and cooperative agreements administered by DOI. The legislation also would increase direct spending by requiring the Secretary of the Interior to pay aid to private landowners who are prohibited from using their property under certain circumstances.

CBO estimates that the U.S. Fish and Wildlife Service (USFWS) and the Animal and Plant Health Inspection Service (APHIS) would spend a total of about $2.7 billion over the 2006–2010 period to carry out and enforce the ESA as amended by this legislation, assuming appropriation of the necessary amounts. (That total includes spending from funds already appropriated for 2006 and prior years.)

The cost of providing payment of aid to certain land owners is uncertain and would depend on how the legislation would be interpreted by the Administration, private property owners, and the courts. While CBO cannot predict the impact of the aid requirement on the total costs of carrying out the ESA over time, we estimate that federal payments over the 2006–2010 period would likely total less than $10 million because of likely delays in resolving con-

flicting interpretations of the law, implementing the necessary administrative mechanisms, and processing requests. The costs of those payments the program has been fully implemented could be much more significant-despite the likely small size of individual payments—because the volume of requests could be very large at first. After 2010, we expect that such payments would probably average less than $20 million a year—though annual amounts would likely vary significantly from year to year.

H.R. 3824 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA), and would impose no significant additional costs on state, local, or tribal governments. Some provisions in this bill would give state or local governments a greater role in carrying out the Endangered Species Act. Any costs they might incur in response would be incurred voluntarily.

Estimated Cost to the Federal Government: The estimated discretionary budgetary effects of implementing H.R. 3824 are summarized in the following table. The costs of this legislation fall within budget function 300 (natural resources and environment).

	By fiscal year, in millions of dollars—					
	2005	2006	2007	2008	2009	2010
SPENDING SUBJECT TO APPROPRIATION						
ESA Spending Under Current Law:						
Budget Authority [1, 2]	358	379	0	0	0	0
Estimated Outlays	340	350	200	100	0	0
Proposed Changes:						
Estimated Authorization Level	0	118	614	630	649	668
Estimated Outlays	0	91	354	453	528	600
ESA Spending Under H.R. 3765:						
Specified Authorization Level [1]	358	497	614	630	649	668
Estimated Authorization Level	340	441	554	553	528	600
CHANGES IN DIRECT SPENDING						
Estimated Budget Authority	0	0	0	0	1	5
Estimated Outlays	0	0	0	0	1	5

[1] The 2005 and 2006 levels are the amounts appropriated for USFWS and APHIS activities authorized by this bill.
[2] Excludes grants to states from the Cooperative Endangered Species Fund because the authority to provide such assistance does not expire under existing law.

Amounts in the table include only the costs of ESA activities carried out by the USFWS and APHIS. H.R. 3824 would not authorize appropriations for ESA programs carried out by the National Oceanic and Atmospheric Administration, which is responsible for protecting threatened or endangered marine species. Also, the activities of other DOI agencies such as the Bureau of Land Management and the Bureau of Reclamation (both of which incur significant costs to protect endangered and threatened species on lands under their jurisdiction) and the costs of other federal agencies who must comply with the ESA are not included in this estimate.

Basis of estimate: For purposes of this estimate, CBO has assumed that H.R. 3824 will be enacted during fiscal year 2006 and that the entire amounts estimated to be necessary to carry out the bill will be appropriated for each of fiscal years 2006 through 2010. This estimate is based on information provided by the Office of Management and Budget, the Department of the Interior, nonprofit organizations, and various state agencies. Outlays for administrative activities have been estimated on the basis of historical spending patterns for ongoing ESA programs. Spending rates for new as-

sistance programs under the bill reflect expected delays because of the time that would be required to promulgate new regulations and develop administrative procedures.

Spending subject to appropriation

The Congress appropriated $358 million for 2005 and $379 million for 2006 to carry out ESA activities. CBO estimates that, under H.R. 3824, discretionary funding could rise to more than $600 million a year.

Administrative Costs. Although authorizations for funding under the ESA expired in 1992, Congress has continued to provide funds each year for programs carried out under the act. For fiscal year 2005, the Congress provided $234 million for traditional ESA activities and programs carried out by the USFWS.

CBO estimates that the USFWS would need additional funding of $118 million in fiscal year 2006 and a total of $2.6 billion over the 2006–2010 period to carry out its responsibilities as the primary agency charged with implementing the ESA (as amended by H.R. 3824). In total, this estimated funding level is more than double the agency's ESA operating budget in recent years. The higher estimated authorization levels reflect the costs of developing and administering new financial assistance programs, modifying USFWS regulatory procedures to incorporate amendments made by the bill, and meeting new planning deadlines. We estimate that funding for APHIS, which helps to enforce the act, would continue at its existing level of roughly $7 million a year.

The estimated authorization levels for the USFWS include:

- About $240 million a year to carry out traditional FWS regulatory programs to identify, evaluate, and protect threatened or endangered species, develop and implement habitat conservation plans and species recovery plans, and consult with other federal agencies that carry out, authorize, or fund projects that may affect protected species;
- $6 million annually for the implementation of the Convention on International Trade in Endangered Species (CITES);
- About $115 million a year to implement changes to existing ESA programs required by the bill, including costs to incorporate new definitions to be used in USFWS regulatory procedures, expedite the development of recovery plans to reflect new deadlines, and establish new financial assistance programs mandated by sections 9 and 13 of the bill;
- $2 million in each of fiscal years 2006 and 2007 to create and maintain an online database of ESA information as required by section 14;
- Between $5 million and $10 million annually to process requests made by property owners under sections 12 and 13 of the bill. Under section 12, persons whose land may be home to a protected species could request the Secretary of the Interior to provide a written determination that a proposed use of that property would comply with the ESA. The Secretary would have 180 days to make a determination unless an extension is negotiated; failure to do so would be deemed to be an approval of the proposed use. Section 13 would allow property owners to apply for aid to compensate them for the loss of property value

if they receive a written determination from the Secretary that a proposed land use would not comply with the ESA; and

• $1 million a year to compensate landowners for livestock killed by protected species that have been reintroduced to the wild as part of a recovery plan.

Discretionary Grants, Cooperative Agreements, and Other Assistance. H.R. 3824 would authorize the USFWS to provide nonfederal entities with several forms of financial assistance, subject to the availability of appropriated funds. The assistance programs authorized by the bill would provide annual payments to states, local governments, nonprofit organizations, and private landowners who assume conservation and planning responsibilities under the ESA. The bill also would expand the purposes for which state grants from the Cooperative Endangered Species Fund (CESF) may be used.

CBO estimates that the USFWS would need $240 million annually to fully fund and administer the grant programs and cooperative agreements envisioned by the bill, or about $140 million more than the amounts appropriated for similar programs for fiscal year 2006.

Direct spending

Section 13 of the bill would provide an administrative procedure for providing payment of aid to landowners whose use of their property has been restricted by ESA regulatory decisions. CBO expects that enacting this provision would result in new direct spending, but the level of such spending is uncertain. This provision would direct the Secretary of the Interior to make a one-time payment to any landowner who requests aid within 180 days of receiving a written determination under section 12 of the bill that a proposed use of the landowner's property would not comply with the ESA (or that a prior, favorable determination has been withdrawn). The amount of any payment would be equal to the fair market value of the forgone use of the affected portion of the property, as determined by an independent appraisal and taking into account whether or not the proposed use would have been allowed under state and local law. The Secretary would be required to pay the landowner within 180 days of receiving the request or within 180 days of resolving any valuation disputes or other conflicts. Such mandatory payments would increase direct spending costs.

CBO estimates that such costs would likely be small over the next five years—probably less than $10 million.

This provision would make it much easier (and cheaper) for private landowners to seek and obtain compensation from the federal government by allowing them to request such aid directly from the Secretary rather than filing a lawsuit against the United States (as they must under current law).

In addition to providing an alternative to litigation, the bill would change current law in two important ways that could affect how property owners seek, and how the government pays, compensation. First, the bill would delineate specific standards, definitions, and valuation procedures to be used in determining when and what the government is obligated to pay when its actions under the ESA prohibit the use of private property. Second, the procedure created by section 12 of the bill (to allow property own-

ers to obtain written determinations permitting or rejecting a proposed use of their property) would provide these owners with a definitive agency action that would constitute the basis of a claim for compensation if they still choose to sue.

Compensation Under Current Law. Under existing law, persons who wish to seek compensation for property that they believe has been adversely affected by a government action (including administration of the ESA) usually must do so through litigation—generally in the United States Court of Claims.

The process is time-consuming and expensive. In order for a property owner to sue for compensation, he or she must first overcome the costly administrative hurdle of seeking and being denied an incidental take statement or obtaining some other regulatory determination from the government. Property owners who pursue such claims can wait years before their cases are heard. Decisions unfavorable to the government have been rare in the past because of the high loss thresholds and other valuation hurdles that the landowner must overcome before the courts will award compensation, and the government often appeals such awards. Because the costs of obtaining the necessary permit denial and associated legal costs are greater than most property owners can afford, relatively few compensation claims are brought against the United States (although there has been a steady increase in the past decade). Those cases that are brought typically involve relatively large claims ($100,000 to more than $100 million) and are usually brought by corporations or other large property owners. Such claims can require more than a decade to resolve. Smaller claims are rarely pursued because small landowners are unable to obtain the necessary permit denials or other agency decisions, cannot afford to sue the government, or would not expect to receive enough compensation to justify the substantial expense of attorneys and scientific experts.

Compensation Under H.R. 3824. The creation of an administrative forum would make it much easier for private property owners to seek reimbursement when they are prohibited from using their property as a result of ESA regulations. Although the number of administrative claims could be quite large at first, CBO expects that relatively few or no payments would be made over the next several years because of the time required to implement the necessary procedures and make other case-by-case determinations. For example, no request could be processed under section 13 until the landowner receives a written determination against his or her proposed use under section 12, and CBO expects that it would take the USFWS one or two years to establish the administrative mechanisms needed to implement section 12 and begin processing the first requests for written determinations. Only then would landowners who receive notice that their proposed use is prohibited be able to request aid under section 13. Such landowners would likely face similar delays at this stage of the process, especially in the early years of the program, while the agency determines the property interest affected by its earlier decision and the fair market value of that interest.

Once the aid program has been fully implemented, total payments to landowners would almost certainly be greater than the costs of compensating individuals who bring suit under existing law (particularly since there are so few such claims at present).

CBO expects that most aid payments eventually made by the government would be relatively small (often as little as a few thousand dollars) because the vast majority of aid requests would likely involve small parcels of land or some minor fraction ("affected portion") of larger tracts. However, the agency may face a large volume of requests, at least initially, because the availability of an administrative process would make it economically feasible for small landowners who often cannot afford to sue the government under existing legal avenues to seek compensation.

We expect that it would be difficult for landowners to receive aid for larger claims above $1 million under the section 13 process because most larger land-use projects would be ineligible to receive written determinations under section 12.

After 2010, CBO estimates that payments would average less than $20 million a year. Such payments could vary significantly from year to year.

CBO expects that civil litigation would increase as a result of H.R. 3824, at least in the short run, because many requests for aid would likely involve conflicting interpretations of the statute that could require the courts to resolve. Moreover, we expect that smaller landowners who choose to sue the government rather than apply for aid under section 13 would find it easier to do so because they would be able to use the written determination prohibiting their proposed use as a basis for their claims. CBO cannot predict the outcomes of any lawsuits that might be brought as a result. Even if the government would ultimately lose more lawsuits as a result of the legislation, additional compensation costs would probably be minimal in the 2006–2010 period because claims would take several years to resolve. We expect that the effect on the number of larger claims would be less significant for the same reasons that we expect larger requests for aid to be unsuccessful.

Intergovernmental and private-sector impact: H.R. 3824 contains no intergovernmental or private-sector mandates as defined in UMRA, and would impose no significant additional costs on State, local, or tribal governments. Some provisions in this bill would give state and local governments a greater role in carrying out the ESA. Any costs they might incur in response would be incurred voluntarily.

Estimate prepared by: Federal Costs: Deborah Reis. Impact on State, Local, and Tribal Governments: Marjorie Miller. Impact on the Private Sector: Selena Caldera.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104–4

This bill contains no unfunded mandates.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omit-

ted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

ENDANGERED SPECIES ACT OF 1973

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".

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Sec. 18. Authorization of appropriations.

* * * * * * *

DEFINITIONS

SEC. 3. For the purposes of this Act—

(1) * * *

(2)(A) The term "best available scientific data" means scientific data, regardless of source, that are available to the Secretary at the time of a decision or action for which such data are required by this Act and that the Secretary determines are the most accurate, reliable, and relevant for use in that decision or action.

(B) Not later than one year after the date of the enactment of the Threatened and Endangered Species Recovery Act of 2005, the Secretary shall issue regulations that establish criteria that must be met to determine which data constitute the best available scientific data for purposes of subparagraph (A).

(C) If the Secretary determines that data for a decision or action do not comply with the criteria established by the regulations issued under subparagraph (B), do not comply with guidance issued under section 515 of the Treasury and General Government Appropriations Act, 2001 (Public Law 106–554; 114 Stat. 2763A–171) by the Director of the Office of Management and Budget and the Secretary, do not consist of any empirical data, or are found in sources that have not been subject to peer review in a generally acceptable manner—

(i) the Secretary shall undertake the necessary measures to assure compliance with such criteria or guidance; and

(ii) the Secretary may—

(I) secure such empirical data;

(II) seek appropriate peer review; and

(III) reconsider the decision or action based on any supplemental or different data provided or any peer review conducted pursuant to this subparagraph.

[(2)] *(3)* The term "commercial activity" means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however,* That it does not include exhibitions of commodities by museums or similar cultural or historical organizations.

[(3)] *(4)* The terms "conserve," "conserving," and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

[(4)] *(5)* The term "Convention" means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto.

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

[(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, 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.]

* * * * * * *

(11) The term "jeopardize the continued existence" means, with respect to an agency action (as that term is defined in section 7(a)(2)), that the action reasonably would be expected to significantly impede, directly or indirectly, the conservation in the long-term of the species in the wild.

[(12) The term "permit or license applicant" means, when used with respect to an action of a Federal agency for which exemption is sought under section 7, any person whose application to such agency for a permit or license has been denied primarily because of the application of section 7(a) to such agency action.]

(12) The term "permit or license applicant" means, when used with respect to an action of a Federal agency that is subject to section 7(a) or (b), any person that has applied to such agency for a permit or license or for formal legal approval to perform an act.

* * * * * * *

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

[(i) 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

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

[(B)(i) The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

[(ii) Nothing in this paragraph affects the requirement to consult under section 7(a)(2) with respect to an agency action (as that term is defined in that section).

[(iii) Nothing in this paragraph affects the obligation of the Department of Defense to comply with section 9, including the prohibition preventing extinction and taking of endangered species and threatened species.]

DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

SEC. 4. (a) IN 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 by human activities, competition from other species, drought, fire, or other catastrophic natural causes.

(B) Overutilization for commercial, recreational, scientific, or educational purposes.

(C) Disease or predation.

(D) The inadequacy of existing regulatory mechanisms, including any efforts identified pursuant to subsection (b)(1).

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

(2) The Secretary shall use the authority provided by paragraph (1) to determine any distinct population of any species of vertebrate fish or wildlife to be an endangered species or a threatened species only sparingly.

(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] *best available scientific data* after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any *Federal agency, 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.

[(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, the impact on national security, 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 avail-

able, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.]

[(3)] *(2)*(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. *The Secretary shall not make a finding that the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted unless the petitioner provides to the Secretary a copy of all information cited in the petition.*

* * * * * * *

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

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

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

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) [to the State agency in] *to the Governor of, and 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] *such Governor or agency*, and each such jurisdiction, thereon; *and*

(iii) maintain, and shall make available, a complete record of all information concerning the determination or revision in the possession of the Secretary, on a publicly ac-

cessible website on the Internet, including an index to such information.

(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] *the Secretary* deems appropriate;

* * * * * * *

[(6)] *(5)*(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.]

(i) a final regulation to implement such a determination of whether a species is an endangered species or a threatened species;

(ii) notice that such 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 such withdrawal is based.

(B)(i) If the Secretary finds with respect to a proposed regulation referred to in [subparagraph (A)(i)] *subparagraph (A)* 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)] *subparagraph (A)* 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 with-

drawn under this clause unless [he] *the Secretary* determines that sufficient new information is available to warrant such proposal.

* * * * * * *

[(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)] *(6)* Neither paragraph (4), (5), or (6) of this subsection nor section 553 of title 5, United States Code, shall apply to any regulation *with respect to a determination of a species to be an endangered species or a threatened species* 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] *the Governor of, and 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] *the Secretary,* that substantial evidence does not exist to warrant such regulation, [he] *the Secretary* shall withdraw it.

[(8)] *(7)* 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.].

(8)(A) Information maintained and made available under paragraph (5)(A)(iii) shall include any status review, all information cited in such a status review, all information referred to in the proposed regulation and the preamble to the proposed regulation, and all information submitted to the Secretary by third parties.

(B) The Secretary shall withhold from public review under paragraph (5)(A)(iii) any information that may be withheld under 552 of title 5, United States Code.

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

[(2) The Secretary shall—

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

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

[(i) be removed from such list;

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

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

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

(2)(A) The Secretary shall—

(i) conduct, at least once every 5 years, based on the information collected for the biennial reports to the Congress required by paragraph (3) of subsection (f), a review of all species included in a list that is published pursuant to paragraph (1) and that is in effect at the time of such review; and

(ii) determine on the basis of such review and any other information the Secretary considers relevant 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.

(B) Each determination under subparagraph (A)(ii) shall be made in accordance with subsections (a) and (b).

(3) Each determination under paragraph (2)(B) shall consider one of the following:

(A) Except as provided in subparagraph (B) of this paragraph, the criteria in the recovery plan for the species required by section 5(c)(1)(A) or (B).

(B) If the recovery plan is issued before the criteria required under section 5(c)(1)(A) and (B) are established or if no recovery plan exists for the species, the factors for determination that a species is an endangered species or a threatened species set forth in subsections (a)(1) and (b)(1).

(C) A finding of fundamental error in the determination that the species is an endangered species, a threatened species, or extinct.

(D) A determination that the species is no longer an endangered species or threatened species or in danger of extinction, based on an analysis of the factors that are the basis for listing under section 4(a)(1).

(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.

[(f)(1) RECOVERY PLANS.—The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable—

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

[(B) incorporate in each plan—

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

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

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

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

[(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 Rep-

resentatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed.

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

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

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

[(2) The Secretary shall make prompt use of the authority under paragraph 7 of subsection (b) of this section to prevent a significant risk to the well being of any such recovered species.]

[(h) AGENCY] *(f) SECRETARIAL* GUIDELINES.—The Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that [the purposes of this section are achieved] *this section is implemented* 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) the criteria for determining best available scientific data pursuant to section 3(2); and

[(4)] *(5)* a system for developing and implementing, on a priority basis, recovery plans under [subsection (f) of this section] *section 5*.

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)] *(g) COMMENTS.*—If, in the case of any regulation proposed by the Secretary under the authority of this section, [a State agency] *a Governor, State agency, county (or equivalent jurisdiction), or unit of local government* 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] *a Governor, State agency, county (or equivalent jurisdiction), or unit of local government* under subsection (b)(3), the Secretary shall submit to [the State agency] *the Governor, State agency, county (or equivalent jurisdiction), or unit of local government, respectively* a written justification for [his] *the*

failure to adopt regulations consistent with the [agency's] comments or petition.

[LAND ACQUISITION

[SEC. 5.]

RECOVERY PLANS AND LAND ACQUISITION

SEC. 5. (a) RECOVERY PLANS.—The Secretary shall, in accordance with this section, develop and implement a plan (in this subsection referred to as a "recovery plan") for the species determined under section 4(a)(1) to be an endangered species or a threatened species, unless the Secretary finds that such a plan will not promote the conservation and survival of the species.

(b) DEVELOPMENT OF RECOVERY PLANS.—(1) Subject to paragraphs (2) and (3), the Secretary, in developing recovery plans, shall, to the maximum extent practicable, 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.

(2) In the case of any species determined to be an endangered species or threatened species after the date of the enactment of the Threatened and Endangered Species Recovery Act of 2005, the Secretary shall publish a final recovery plan for a species within 2 years after the date the species is listed under section 4(c).

(3)(A) For those species that are listed under section 4(c) on the date of enactment of the Threatened and Endangered Species Recovery Act of 2005 and are described in subparagraph (B) of this paragraph, the Secretary, after providing for public notice and comment, shall—

(i) not later than 1 year after such date, publish in the Federal Register a priority ranking system for preparing or revising such recovery plans that is consistent with paragraph (1) and takes into consideration the scientifically based needs of the species; and

(ii) not later than 18 months after such date, publish in the Federal Register a list of such species ranked in accordance with the priority ranking system published under clause (i) for which such recovery plans will be developed or revised, and a tentative schedule for such development or revision.

(B) A species is described in this subparagraph if—

(i) a recovery plan for the species is not published under this Act before the date of enactment of the Threatened and Endangered Species Recovery Act of 2005 and the Secretary finds such a plan would promote the conservation and survival of the species; or

(ii) a recovery plan for the species is published under this Act before such date of enactment and the Secretary finds revision of such plan is warranted.

(C)(i) The Secretary shall, to the maximum extent practicable, adhere to the list and tentative schedule published under subparagraph (A)(ii) in developing or revising recovery plans pursuant to this paragraph.

(ii) The Secretary shall provide the reasons for any deviation from the list and tentative schedule published under subparagraph (A)(ii), in each report to the Congress under subsection (e).

(4) The Secretary, using the priority ranking system required under paragraph (3), shall prepare or revise such plans within 10 years after the date of the enactment of the Threatened and Endangered Species Recovery Act of 2005.

(c) PLAN CONTENTS.—(1)(A) Except as provided in subparagraph (E), a recovery plan shall be based on the best available scientific data and shall include the following:

(i) Objective, measurable criteria that, when met, would result in a determination, in accordance with this section, that the species to which the recovery plan applies be removed from the lists published under section 4(c) or be reclassified from an endangered species to a threatened species.

(ii) A description of such site-specific or other measures that would achieve the criteria established under clause (i), including such intermediate measures as are warranted to effect progress toward achievement of the criteria.

(iii) Estimates of the time required and the costs to carry out those measures described under clause (ii), including, to the extent practicable, estimated costs for any recommendations, by the recovery team, or by the Secretary if no recovery team is selected, that any of the areas identified under clause (iv) be acquired on a willing seller basis.

(iv) An identification of those specific areas that are of special value to the conservation of the species.

(B) Those members of any recovery team appointed pursuant to subsection (d) with relevant scientific expertise, or the Secretary if no recovery team is appointed, shall, based solely on the best available scientific data, establish the objective, measurable criteria required under subparagraph (A)(i).

(C)(i) If the recovery team, or the Secretary if no recovery team is appointed, determines in the recovery plan that insufficient best available scientific data exist to determine criteria or measures under subparagraph (A) that could achieve a determination to remove the species from the lists published under section 4(c), the recovery plan shall contain interim criteria and measures that are likely to improve the status of the species.

(ii) If a recovery plan does not contain the criteria and measures provided for by clause (i) of subparagraph (A), the recovery team for the plan, or by the Secretary if no recovery team is appointed, shall review the plan at intervals of no greater than 5 years and determine if the plan can be revised to contain the criteria and measures required under subparagraph (A).

(iii) If the recovery team or the Secretary, respectively, determines under clause (ii) that a recovery plan can be revised to add the criteria and measures provided for under subparagraph (A), the recovery team or the Secretary, as applicable, shall revise the recovery plan to add such criteria and measures within 2 years after the date of the determination.

(D) In specifying measures in a recovery plan under subparagraph (A), a recovery team or the Secretary, as applicable, shall—

(i) whenever possible include alternative measures; and

(ii) in developing such alternative measures, the Secretary shall seek to identify, among such alternative measures of comparable expected efficacy, the alternative measures that are least costly.

(E) Estimates of time and costs pursuant to subparagraph (A)(iii), and identification of the least costly alternatives pursuant to subparagraph (D)(ii), are not required to be based on the best available scientific data.

(2) Any area that, immediately before the enactment of the Threatened and Endangered Species Recovery Act of 2005, is designated as critical habitat of an endangered species or threatened species shall be treated as an area described in subparagraph (A)(iv) until a recovery plan for the species is developed or the existing recovery plan for the species is revised pursuant to subsection (b)(3).

(d) RECOVERY TEAMS.—(1) The Secretary shall promulgate regulations that provide for the establishment of recovery teams for development of recovery plans under this section.

(2) Such regulations shall—

(A) establish criteria and the process for selecting the members of recovery teams, and the process for preparing recovery plans, that ensure that each team—

(i) is of a size and composition to enable timely completion of the recovery plan; and

(ii) includes sufficient representation from constituencies with a demonstrated direct interest in the species and its conservation or in the economic and social impacts of its conservation to ensure that the views of such constituencies will be considered in the development of the plan;

(B) include provisions regarding operating procedures of and recordkeeping by recovery teams;

(C) ensure that recovery plans are scientifically rigorous and that the evaluation of costs required by paragraphs (1)(A)(iii) and (1)(D) of subsection (c) are economically rigorous; and

(D) provide guidelines for circumstances in which the Secretary may determine that appointment of a recovery team is not necessary or advisable to develop a recovery plan for a specific species, including procedures to solicit public comment on any such determination.

(3) The Federal Advisory Committee Act (5 App. U.S.C.) shall not apply to recovery teams appointed in accordance with regulations issued by the Secretary under this subsection.

(e) REPORTS TO CONGRESS.—(1) The Secretary shall report every two years to the Committee on Resources of the House of Representatives and the Committee on Environment and Public Works of the Senate on the status of all domestic endangered species and threatened species and the status of efforts to develop and implement recovery plans for all domestic endangered species and threatened species.

(2) In reporting on the status of such species since the time of its listing, the Secretary shall include—

(A) an assessment of any significant change in the well-being of each such species, including—

(i) changes in population, range, or threats; and

(ii) the basis for that assessment; and

(B) for each species, a measurement of the degree of confidence in the reported status of such species, based upon a quantifiable parameter developed for such purposes.

(f) PUBLIC NOTICE AND COMMENT.—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.

(g) STATE COMMENT.—The Secretary shall, prior to final approval of a new or revised recovery plan, provide a draft of such plan and an opportunity to comment on such draft to the Governor of, and State agency in, any State to which such draft would apply. The Secretary shall include in the final recovery plan the Secretary's response to the comments of the Governor and the State agency.

(h) CONSULTATION TO ENSURE CONSISTENCY WITH DEVELOPMENT PLAN.—(1) The Secretary shall, prior to final approval of a new or revised recovery plan, consult with any pertinent State, Indian tribe, or regional or local land use agency or its designee.

(2) For purposes of this Act, the term "Indian tribe" means—

(A) with respect to the 48 contiguous States, any federally recognized Indian tribe, organized band, pueblo, or community; and

(B) with respect to Alaska, the Metlakatla Indian Community.

(i) USE OF PLANS.—(1) Each Federal agency shall consider any relevant best available scientific data contained in a recovery plan in any analysis conducted under section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2)(A)(i) The head of any Federal agency may enter into an agreement with the Secretary specifying the measures the agency will carry out to implement a recovery plan.

(ii) Each such agreement shall be published in draft form with notice and an opportunity for public comment.

(iii) Each such final agreement shall be published, with responses by the head of the Federal agency to any public comments submitted on the draft agreement.

(B) Nothing in a recovery plan shall be construed to establish regulatory requirements.

(j) 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 that have recovered to the point at which the measures provided pursuant to this Act are no longer necessary and that, in accordance with this section, have been removed from the lists published under section 4(c).

(2) The Secretary shall make prompt use of the authority under section 4(b)(6) to prevent a significant risk to the well-being of any such recovered species.

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

(1) shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended, the Fish and Wildlife Coordination Act, as amended, and the Migratory Bird Conservation Act, as appropriate; and

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

[(b)] *(l)* ACQUISITIONS.—Funds made available pursuant to the Land and Water Conservation Fund Act of 1965, as amended, may be used for the purpose of acquiring lands, waters, or interests therein under [subsection (a) of this section] *subsection (k)*.

(m) THREATENED AND ENDANGERED SPECIES INCENTIVES PROGRAM.—(1) The Secretary may enter into species recovery agreements pursuant to paragraph (2) and species conservation contract agreements pursuant to paragraph (3) with persons, other than agencies or departments of the Federal Government or State governments, under which the Secretary is obligated, subject to the availability of appropriations, to make annual payments or provide other compensation to the persons to implement the agreements.

(2)(A) The Secretary and persons who own or control the use of private land may enter into species recovery agreements with a term of not less than 5 years that meet the criteria set forth in subparagraph (B) and are in accordance with the priority established in subparagraph (C).

(B) A species recovery agreement entered into under this paragraph by the Secretary with a person—

(i) shall require that the person shall carry out, on the land owned or controlled by the person, activities that—

(I) protect and restore habitat for covered species that are species determined to be endangered species or threatened species pursuant to section 4(a)(1);

(II) contribute to the conservation of one or more covered species; and

(III) specify and implement a management plan for the covered species;

(ii) shall specify such a management plan that includes—

(I) identification of the covered species;

(II) a description of the land to which the agreement applies; and

(III) a description of, and a schedule to carry out, the activities under clause (i);

(iii) shall provide sufficient documentation to establish ownership or control by the person of the land to which the agreement applies;

(iv) shall include the amounts of the annual payments or other compensation to be provided by the Secretary to the person under the agreement, and the terms under which such payments or compensation shall be provided; and

(v) shall include—

(I) the duties of the person;

(II) the duties of the Secretary;

(III) the terms and conditions under which the person and the Secretary mutually agree the agreement may be modified or terminated; and

(IV) acts or omissions by the person or the Secretary that shall be considered violations of the agreement, and procedures under which notice of and an opportunity to remedy any violation by the person or the Secretary shall be given.

(C) In entering into species recovery agreements under this paragraph, the Secretary shall accord priority to agreements that apply to any areas that are identified in recovery plans pursuant to subsection (c)(1)(A)(iv).

(3)(A) The Secretary and persons who own private land may enter into species conservation contract agreements with terms of 30 years, 20 years, or 10 years that meet the criteria set forth in subparagraph (B) and standards set forth in subparagraph (D) and are in accordance with the priorities established in subparagraph (C).

(B) A species conservation contract agreement entered into under this paragraph by the Secretary with a person—

(i) shall provide that the person shall, on the land owned by the person—

(I) carry out conservation practices to meet one or more of the goals set forth in clauses (i) through (iii) of subparagraph (C) for one or more covered species, that are species that are determined to be endangered species or threatened species pursuant to section 4(a)(1), species determined to be candidate species pursuant to section 4(b)(3)(B)(iii), or species subject to comparable designations under State law; and

(II) specify and implement a management plan for the covered species;

(ii) shall specify such a management plan that includes—

(I) identification of the covered species;

(II) a description in detail of the conservation practices for the covered species that the person shall undertake;

(III) a description of the land to which the agreement applies; and

(IV) a schedule of approximate deadlines, whether one-time or periodic, for undertaking the conservation practices described pursuant to subclause (II);

(V) a description of existing or future economic activities on the land to which the agreement applies that are compatible with the conservation practices described pursuant to subclause (II) and generally with conservation of the covered species;

(iii) shall specify the term of the agreement; and

(iv) shall include—

(I) the duties of the person;

(II) the duties of the Secretary;

(III) the terms and conditions under which the person and the Secretary mutually agree the agreement may be modified or terminated;

(IV) acts or omissions by the person or the Secretary that shall be considered violations of the agreement, and procedures under which notice of and an opportunity to remedy any violation by the person or the Secretary shall be given; and

(V) terms and conditions for early termination of the agreement by the person before the management plan is fully implemented or termination of the agreement by the Secretary in the case of a violation by the person that is not remedied under subclause (IV), including any requirement

for the person to refund all or part of any payments received under subparagraph (E) and any interest thereon.

(C) The Secretary shall establish priorities for the selection of species conservation contract agreements, or groups of such agreements for adjacent or proximate lands, to be entered into under this paragraph that address the following factors:

(i) The potential of the land to which the agreement or agreements apply to contribute significantly to the conservation of an endangered species or threatened species or a species with a comparable designation under State law.

(ii) The potential of such land to contribute significantly to the improvement of the status of a candidate species or a species with a comparable designation under State law.

(iii) The amount of acreage of such land.

(iv) The number of covered species in the agreement or agreements.

(v) The degree of urgency for the covered species to implement the conservation practices in the management plan or plans under the agreement or agreements.

(vi) Land in close proximity to military test and training ranges, installations, and associated airspace that is affected by a covered species.

(D) The Secretary shall enter into a species conservation contract agreement submitted by a person, if the Secretary finds that the person owns such land or has sufficient control over the use of such land to ensure implementation of the management plan under the agreement.

(E)(i) Upon entering into a species conservation contract agreement with the Secretary pursuant to this paragraph, a person shall receive the financial assistance provided for in this subparagraph.

(ii) If the person is implementing fully the agreement, the person shall receive from the Secretary—

(I) in the case of a 30-year agreement, an annual contract payment in an amount equal to 100 percent of the person's actual costs to implement the conservation practices described in the management plan under the terms of the agreement;

(II) in the case of a 20-year agreement, an annual contract payment in an amount equal to 80 percent of the person's actual costs to implement the conservation practices described in the management plan under the terms of the agreement; and

(III) in the case of a 10-year agreement, an annual contract payment in an amount equal to 60 percent of the person's actual costs to implement the conservation practices described in the management plan under the terms of the agreement.

(iii)(I) If the person receiving contract payments pursuant to clause (ii) receives any other State or Federal funds to defray the cost of any conservation practice, the cost of such practice shall not be eligible for such contract payments.

(II) Contributions of agencies or organizations to any conservation practice other than the funds described in subclause (I) shall not be considered as costs of the person for purposes of the contract payments pursuant to clause (iii).

(4)(A) Upon request of a person seeking to enter into an agreement pursuant to this subsection, the Secretary may provide to such person technical assistance in the preparation, and management train-

ing for the implementation, of the management plan for the agreement.

(B) Any State agency, local government, nonprofit organization, or federally recognized Indian tribe may provide assistance to a person in the preparation of a management plan, or participate in the implementation of a management plan, including identifying and making available certified fisheries or wildlife biologists with expertise in the conservation of species for purposes of the preparation or review and approval of management plans for species conservation contract agreements under paragraph (3)(D)(iii).

(5) Upon any conveyance or other transfer of interest in land that is subject to an agreement under this subsection—

(A) the agreement shall terminate if the agreement does not continue in effect under subparagraph (B);

(B) the agreement shall continue in effect with respect to such land, with the same terms and conditions, if the person to whom the land or interest is conveyed or otherwise transferred notifies the Secretary of the person's election to continue the agreement by no later than 30 days after the date of the conveyance or other transfer and the person is determined by the Secretary to qualify to enter into an agreement under this subsection; or

(C) the person to whom the land or interest is conveyed or otherwise transferred may seek a new agreement under this subsection.

(6) An agreement under this subsection may be renewed with the mutual consent of the Secretary and the person who entered into the agreement or to whom the agreement has been transferred under paragraph (5).

(7) The Secretary shall make annual payments under this subsection as soon as possible after December 31 of each calendar year.

(8) An agreement under this subsection that applies to an endangered species or threatened species shall, for the purpose of section 10(a)(4), be deemed to be a permit to enhance the propagation or survival of such species under section 10(a)(1), and a person in full compliance with the agreement shall be afforded the protection of section 10(a)(4).

(9) The Secretary, or any other Federal official, may not require a person to enter into an agreement under this subsection as a term or condition of any right, privilege, or benefit, or of any action or refraining from any action, under this Act.

COOPERATION WITH THE STATES

SEC. 6. (a) * * *

* * * * * * *

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

suant to this paragraph, that the State program is not in accordance with this Act, [he] *the Secretary* shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species and threatened species, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program—

(A) * * *

* * * * * * *

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

(A) * * *

* * * * * * *

(3)(A) Any cooperative agreement entered into by the Secretary under this subsection may also provide for development of a program for conservation of species determined to be candidate species pursuant to section 4(b)(2)(B)(iii) or any other species that the State and the Secretary agree is at risk of being determined to be an endangered species or threatened species under section 4(a)(1) in that State. Upon completion of consultation on the agreement pursuant to subsection (e)(2), any incidental take statement issued on the agreement shall apply to any such species, and to the State and any landowners enrolled in any program under the agreement, without further consultation (except any additional consultation pursuant to subsection (e)(2)) if the species is subsequently determined to be an endangered species or a threatened species and the agreement remains an adequate and active program for the conservation of endangered species and threatened species.

(B) Any cooperative agreement entered into by the Secretary under this subsection may also provide for monitoring or assistance in monitoring the status of candidate species pursuant to section 4(b)(3)(C)(iii) or recovered species pursuant to section 5(j).

(C) The Secretary shall periodically review each cooperative agreement under this subsection and seek to make changes the Secretary considers necessary for the conservation of endangered species and threatened species to which the agreement applies.

(4) Any cooperative agreement entered into by the Secretary under this subsection that provides for the enrollment of private lands or

water rights in any program established by the agreement shall ensure that the decision to enroll is voluntary for each owner of such lands or water rights.

(5)(A) The Secretary may enter into a cooperative agreement under this subsection with an Indian tribe in substantially the same manner in which the Secretary may enter into a cooperative agreement with a State.

(B) For the purposes of this paragraph, the term "Indian tribe" means—

(i) with respect to the 48 contiguous States, any federally recognized Indian tribe, organized band, pueblo, or community; and

(ii) with respect to Alaska, the Metlakatla Indian Community.

(d) ALLOCATION OF FUNDS.—(1) The Secretary is authorized to provide financial assistance to any State, through its respective State agency, which has entered into a cooperative agreement [pursuant to subsection (c) of this section] to assist in development of programs for the conservation of endangered and threatened species or to assist in monitoring the status of candidate species pursuant to subparagraph (C) of section 4(b)(3) and recovered species pursuant to [section 4(g)] *section 5(j)*. The Secretary shall allocate each annual appropriation made in accordance with the provisions of subsection (i) of this section to such States based on consideration of—

(A) * * *

* * * * * * *

(F) the importance of [monitoring the status of candidate species] *developing a conservation program for, or monitoring the status of, candidate species or other species determined to be at risk pursuant to subsection (c)(3)* within a State to prevent a significant risk to the well being of any such species; and

* * * * * * *

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

(i) * * *

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

(3) A State shall not be eligible for financial assistance under this section for a fiscal year unless the State has provided to the Secretary for the preceding fiscal year information regarding the expenditures referred to in section 16(b)(2).

(e) REVIEW OF STATE PROGRAMS.—*(1)* Any action taken by the Secretary under this section shall be subject to [his periodic review

at no greater than annual intervals] *periodic review by the Secretary every 3 years.*

(2) Any cooperative agreement entered into by the Secretary under subsection (c) shall be subject to section 7(a)(2) through (d) and regulations implementing such provisions only before—

(A) the Secretary enters into the agreement; and

(B) the Secretary approves any renewal of, or amendment to, the agreement that—

(i) addresses species that are determined to be endangered species or threatened species, are not addressed in the agreement, and may be affected by the agreement; or

(ii) new information about any species addressed in the agreement that the Secretary determines—

(I) constitutes the best available scientific data; and

(II) indicates that the agreement may have adverse effects on the species that had not been considered previously when the agreement was entered into or during any revision thereof or amendment thereto.

(3) The Secretary may suspend any cooperative agreement established pursuant to subsection (c), after consultation with the Governor of the affected State, if the Secretary finds during the periodic review required by paragraph (1) of this subsection that the agreement no longer constitutes an adequate and active program for the conservation of endangered species and threatened species.

(4) The Secretary may terminate any cooperative agreement entered into by the Secretary under subsection (c), after consultation with the Governor of the affected State, if—

(A) as result of the procedures of section 7(a)(2) through (d) undertaken pursuant to paragraph (2) of this subsection, the Secretary determines that continued implementation of the cooperative agreement is likely to jeopardize the continued existence of endangered species or threatened species, and the cooperative agreement is not amended or revised to incorporate a reasonable and prudent alternative offered by the Secretary pursuant to section 7(b)(3); or

(B) the cooperative agreement has been suspended under paragraph (3) of this subsection and has not been amended or revised and found by the Secretary to constitute an adequate and active program for the conservation of endangered species and threatened species within 180 days after the date of the suspension.

* * * * * * *

(g) TRANSITION.—(1) * * *

(2) The prohibitions set forth in or authorized pursuant to sections 4(d) and 9(a)(1)(B) of this Act shall not apply with respect to the taking of any resident endangered species or threatened species (other than species listed in Appendix I to the Convention or otherwise specifically covered by any other treaty or Federal law) within any State—

(A) * * *

(B) except for any time within the establishment period when—

(i) * * *

(ii) the Secretary applies such prohibition after [he] *the Secretary* finds, and publishes his finding, that an emer-

gency exists posing a significant risk to the well-being of such species and that the prohibition must be applied to protect such species. The Secretary's finding and publication may be made without regard to the public hearing or comment provisions of section 553 of title 5, United States Code, or any other provision of this Act; but such prohibition shall expire 90 days after the date of its imposition unless the Secretary further extends such prohibition by publishing notice and a statement of justification of such extension.

* * * * * * *

(j) RECOVERY PLANS FOR SPECIES OCCUPYING MORE THAN ONE STATE.—Any recovery plan under section 5 for an endangered species or a threatened species that occupies more than one State shall identify criteria and actions pursuant to subsection (c)(1) of section 5 for each State that are necessary so that the State may pursue a determination that the portion of the species found in that State may be removed from lists published under section 4(c).

* * * * * * *

INTERAGENCY COOPERATION

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

(2)*(A)* Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any [action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not] *agency action authorized, funded, or carried out by such agency is not* likely to jeopardize the continued existence of any endangered species or threatened species [or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section]. In fulfilling the requirements of this paragraph each agency shall use the [best scientific and commercial data available] *best available scientific data*.

(B) The Secretary may identify specific agency actions or categories of agency actions that may be determined to meet the standards of this paragraph by alternative procedures to the procedures set forth in this subsection and subsections (b) through (d), except that subsections (b)(4) and (e) may apply only to an action that the Secretary finds, or concurs, does meet such standards, and the Secretary shall suggest, or concur in any suggested, reasonable and prudent alternatives described in subsection (b)(3) for any action determined not to meet such standards. Any such agency action or category of agency actions shall be identified, and any such alternative

procedures shall be established, by regulation promulgated prior or subsequent to the date of the enactment of this Act.

(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] *the applicant's* project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be [listed under section 4 or result in the destruction or adverse modification of critical habitat proposed to be designated for such species]*, under section 4 an endangered species or a threatened species*. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

(5) Any Federal agency or the Secretary, in conducting any analysis pursuant to paragraph (2), shall consider only the effects of any agency action that are distinct from a baseline of all effects upon the relevant species that have occurred or are occurring prior to the action.

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

(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 *permit or license* applicant a written statement setting forth—

(I) * * *

* * * * * * *

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

(3)(A) [Promptly after] *Before* conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the *permit or license* applicant, if any, a *proposed* 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.] *The Secretary shall consider any comment from the Federal agency and the permit or license applicant, if any, prior to issuance of the final written statement of the Secretary's opinion. The Secretary shall issue the final written statement of the Secretary's opinion by providing the written statement to the Federal agency and the permit or license applicant, if any, and publishing notice of the written statement in the Federal Register. If jeopardy is found, the Secretary shall suggest in the final written statement*

those reasonable and prudent alternatives, if any, that the Secretary believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action. The Secretary shall cooperate with the Federal agency and any permit or license applicant in the preparation of any suggested reasonable and prudent alternatives.

* * * * * * *

(4)*(A)* If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

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

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

[(C)] *(iii)* if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972;

[the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—] *the Secretary shall include in the written statement under paragraph (3), a statement described in subparagraph (B) of this paragraph.*

(B) A statement described in this subparagraph—

(i) * * *

* * * * * * *

(5)(A) Any terms and conditions set forth pursuant to paragraph (4)(B)(iv) shall be roughly proportional to the impact of the incidental taking identified pursuant to paragraph (4) in the written statement prepared under paragraph (3).

(B) If various terms and conditions are available to comply with paragraph (4)(B)(iv), the terms and conditions set forth pursuant to that paragraph—

(i) must be capable of successful implementation; and

(ii) must be consistent with the objectives of the Federal agency and the permit or license applicant, if any, to the greatest extent possible.

(c) BIOLOGICAL ASSESSMENT.—[(1)] To facilitate compliance with the requirements of subsection (a)(2) each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on the date of enactment of the Endangered Species Act Amendments of 1978, request of the Secretary information whether any species [which is listed or proposed to be listed may be present in the area of such proposed action.] *that is determined to be an endangered species or a threatened species, or for which such a determination is proposed pursuant to section 4, may be present in the area of such proposed action.* If the Secretary advises, based on the [best scientific and commercial data available] *best available scientific data*, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or

within such other period as in mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

[(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.]

* * * * * * *

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

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

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

[(A) The Secretary of Agriculture.

[(B) The Secretary of the Army.

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

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

[(E) The Secretary of the Interior.

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

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

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

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

[(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the

Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5, United States Code.

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

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

[(h) EXEMPTION.—(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5). The Committee shall grant an exemption from the requirements of subsection (a)(2) for an agency action if, by a vote of not less than five of its members voting in person—

[(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection

(g)(4), and on such other testimony or evidence as it may receive, that—

[(i) there are no reasonable and prudent alternatives to the agency action;

[(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

[(iii) the action is of regional or national significance; and

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

[(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28, United States Code. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.]

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

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

[(2)] *such section or in an agreement under section 5(m),* any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

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

INTERNATIONAL COOPERATION

SEC. 8. (a) FINANCIAL ASSISTANCE.—As a demonstration of the commitment of the United States to the worldwide protection of endangered species and threatened species, the President may, subject to the provisions of section 1415 of the Supplemental Appropriation Act, 1953 (31 U.S.C. 724), use foreign currencies accruing to the United States Government under the Agricultural Trade Development and Assistance Act of 1954 or any other law to provide to any foreign county (with its consent) assistance in the development and management of programs in that country which the Secretary determines to be necessary or useful for the conservation of [any endangered species or threatened species listed] *any species determined to be an endangered species or a threatened species* by the Secretary pursuant to section 4 of this Act. The President shall provide assistance (which includes, but is not limited to, the acquisition, by lease or otherwise, of lands, waters, or interests therein) to foreign countries under this section under such terms and conditions as [he] *the President* deems appropriate. Whenever foreign currencies are available for the provision of assistance under this

section, such currencies shall be used in preference to funds appropriated under the authority of [section 15] *section 18* of this Act.

(b) ENCOURAGEMENT OF FOREIGN PROGRAMS.—In order to carry out further the provisions of this Act, the Secretary, through the Secretary of State shall encourage—

(1) foreign countries to provide for the conservation of fish or wildlife and plants including [endangered species and threatened species listed] *species determined to be endangered species and threatened species* pursuant to section 4 of this Act;

* * * * * * *

(3) foreign persons who directly or indirectly take fish or wildlife or plants in foreign countries or on the high seas for importation into the United States for commercial or other purposes to develop and carry out with such assistance as [he] *the Secretary of the Interior* may provide, conservation practices designed to enhance such fish or wildlife or plants and their habitat.

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

(1) assign or otherwise make available any officer or employee of [his] *the Secretary's* department for the purpose of cooperating with foreign countries and international organizations in developing personnel resources and programs which promote the conservation of fish or wildlife or plants, and

* * * * * * *

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

CONVENTION IMPLEMENTATION

SEC. 8A. (a) MANAGEMENT AUTHORITY AND SCIENTIFIC AUTHORITY.—The Secretary [of the Interior (hereinafter in this section referred to as the "Secretary")] is designated as the Management Authority and the Scientific Authority for purposes of the Convention and the respective functions of each such Authority shall be carried out through the United States Fish and Wildlife Service.

* * * * * * *

(c) SCIENTIFIC AUTHORITY FUNCTIONS.—(1) * * *

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

(d) RESERVATIONS BY THE UNITED STATES UNDER CONVENTION.—If the United States votes against including any species in Appendix I or II of the Convention and does not enter a reservation pursuant to paragraph (3) of Article XV of the Convention with respect to that species, the Secretary of State, before the 90th day after the last day on which such a reservation could be entered, shall submit

to the Committee on [Merchant Marine and Fisheries] *Resources* of the House of Representatives, and to the Committee on the Environment and Public Works of the Senate, a written report setting forth the reasons why such a reservation was not entered.

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

* * * * * * *

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

[(4)] *(3)* 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.

PROHIBITED ACTS

SEC. 9. (a) GENERAL.—(1) Except as provided in sections 6(g)(2) and 10 [of this Act, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act], *with respect to any species of fish or wildlife determined to be an endangered species under section 4* it is unlawful for any person subject to the jurisdiction of the United States to—

(A) * * *

* * * * * * *

(G) violate any regulation pertaining to such species or to any [threatened species of fish or wildlife listed pursuant to section 4 of this Act] *species of fish or wildlife determined to be a threatened species under section 4* and promulgated by the Secretary pursuant to authority provided by this Act.

(2) Except as provided in sections 6(g)(2) and 10 [of this Act, with respect to any endangered species of plants listed pursuant to section 4 of this Act], *with respect to any species of plants determined to be an endangered species under section 4*, it is unlawful for any person subject to the jurisdiction of the United States to—

(A) * * *

* * * * * * *

(E) violate any regulation pertaining to such species or to any threatened species of plants [listed pursuant to section 4 of this Act] *determined to be a threatened species under section*

4 and promulgated by the Secretary pursuant to authority provided by this Act.

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

* * * * * * *

(c) VIOLATION OF CONVENTION.—(1) * * *

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

(A) such fish or wildlife is not [an endangered species listed] *a species determined to be an endangered species* pursuant to section 4 of this Act but is listed in Appendix II of the Convention;

* * * * * * *

(d) IMPORTS AND EXPORTS.—

(1) IN GENERAL.—It is unlawful for any person, without first having obtained permission from the Secretary, to engage in business—

(A) as an importer or exporter of fish or wildlife (other than shellfish and fishery products which [(i) are not listed pursuant to section 4 of this Act as endangered species or threatened species, and] *(i) are not determined to be endangered species or threatened species under section 4, and* (ii) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants; or

* * * * * * *

(2) REQUIREMENTS.—Any person required to obtain permission under paragraph (1) of this subsection shall—

(A) keep such records as will fully and correctly disclose each importation or exportation of fish, wildlife, plants, or African elephant ivory made by [him] *such person* and the subsequent disposition, made by [him] *such person* with respect to such fish, wildlife, plants, or ivory;

(B) at all reasonable times upon notice by a duly authorized representative of the Secretary, afford such representative access to [his] *such person's* place of business, an opportunity to examine [his] *such person's* inventory of imported fish, wildlife, plants, or African elephant ivory and the records required to be kept under subparagraph (A) of this paragraph, and to copy such records; and

* * * * * * *

(e) REPORTS.—It is unlawful for any person importing or exporting fish or wildlife (other than shellfish and fishery products which [(1) are not listed pursuant to section 4 of this Act as endangered or threatened species, and] *(1) are not determined to be endangered species or threatened species under section 4, and* (2) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants to fail to file any declaration or report as the Secretary deems necessary to facilitate enforcement of this Act or to meet the obligations of the Convention.

(f) DESIGNATION OF PORTS.—(1) It is unlawful for any person subject to the jurisdiction of the United States to import into or export from the United States any fish or wildlife (other than shellfish and fishery products which [(A) are not listed pursuant to section 4 of this Act as endangered species or threatened species, and] *(A) are not determined to be endangered species or threatened species under section 4, and* (B) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants, except at a port or ports designated by the Secretary [of the Interior]. For the purposes of facilitating enforcement of this Act and reducing the costs thereof, the Secretary [of the Interior], with approval of the Secretary of the Treasury and after notice and opportunity for public hearing, may, by regulation, designate ports and change such designations. The Secretary [of the Interior], under such terms and conditions as [he] *the Secretary* may prescribe, may permit the importation or exportation at nondesignated ports in the interest of the health or safety of the fish or wildlife or plants, or for other reasons if, in [his] *such person's* discretion, [he] *the Secretary* deems it appropriate and consistent with the purpose of this subsection.

* * * * * * *

EXCEPTIONS

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

(A) * * *

* * * * * * *

(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) * * *

* * * * * * *

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

(iv) objective, measurable biological goals to be achieved for species covered by the plan and specific measures for achieving such goals consistent with the requirements of subparagraph (B);

(v) measures the applicant will take to monitor impacts of the plan on covered species and the effectiveness of the plan's measures in achieving the plan's biological goals;

(vi) adaptive management provisions necessary to respond to all reasonably foreseeable changes in circumstances that could appreciably reduce the likelihood of the survival and recovery of any species covered by the plan; and

[(iv)] *(vii)* 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) * * *

* * * * * * *

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

(v) the term of the permit is reasonable, taking into consideration—

(I) the period in which the applicant can be expected to diligently complete the principal actions covered by the plan;

(II) the extent to which the plan will enhance the conservation of covered species;

(III) the adequacy of information underlying the plan;

(IV) the length of time necessary to implement and achieve the benefits of the plan; and

(V) the scope of the plan's adaptive management strategy; and

[(v)] *(vi)* the measures, if any, required under subparagraph (A)(iv) will be met;

and [he] *the Secretary* has received such other assurances as [he] *the Secretary* 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.]

(3) Any terms and conditions offered by the Secretary pursuant to paragraph (2)(B) to reduce or offset the impacts of incidental taking shall be roughly proportional to the impact of the incidental taking specified in the conservation plan pursuant to in paragraph (2)(A)(i). This paragraph shall not be construed to limit the authority of the Secretary to require greater than acre-for-acre mitigation

where necessary to address the extent of such impacts. In any case in which various terms and conditions are available, the terms and conditions shall be capable of successful implementation and shall be consistent with the objective of the applicant to the greatest extent possible.

(4)(A) If the holder of a permit issued under this subsection for other than scientific purposes is in compliance with the terms and conditions of the permit, and any conservation plan or agreement incorporated by reference therein, the Secretary may not require the holder, without the consent of the holder, to adopt any new minimization, mitigation, or other measure with respect to any species adequately covered by the permit during the term of the permit, except as provided in subparagraphs (B) and (C) to meet circumstances that have changed subsequent to the issuance of the permit.

(B) For any circumstance identified in the permit or incorporated document that has changed, the Secretary may, in the absence of consent of the permit holder, require only such additional minimization, mitigation, or other measures as are already provided in the permit or incorporated document for such changed circumstance.

(C) For any changed circumstance not identified in the permit or incorporated document, the Secretary may, in the absence of consent of the permit holder, require only such additional minimization, mitigation, or other measures to address such changed circumstance that do not involve the commitment of any additional land, water, or financial compensation not otherwise committed, or the imposition of additional restrictions on the use of any land, water or other natural resources otherwise available for development or use, under the original terms and conditions of the permit or incorporated document.

(D) The Secretary shall have the burden of proof in demonstrating and documenting, with the best available scientific data, the occurrence of any changed circumstances for purposes of this paragraph.

(E) All permits issued under this subsection on or after the date of the enactment of the Threatened and Endangered Species Recovery Act of 2005, other than permits for scientific purposes, shall contain the assurances contained in subparagraphs (B) through (D) of this paragraph and paragraph (5)(A) and (B). Permits issued under this subsection on or after March 25, 1998, and before the date of the enactment of the Threatened and Endangered Species Recovery Act of 2005, other than permits for scientific purposes, shall be governed by the applicable sections of parts 17.22(b), (c), and (d), and 17.32(b), (c), and (d) of title 50, Code of Federal Regulations, as the same exist on the date of the enactment of the Threatened and Endangered Species Act of 2005.

(5)(A) The Secretary shall revoke a permit issued under paragraph (2) if the Secretary finds that the permittee is not complying with the terms and conditions of the permit.

(B) Any permit subject to paragraph (4)(A) may be revoked due to changed circumstances only if—

(i) the Secretary determines that continuation of the activities to which the permit applies would be inconsistent with the criteria in paragraph (2)(B)(iv);

(ii) the Secretary provides 60 days notice of revocation to the permittee; and

(iii) the Secretary is unable to, and the permittee chooses not to, remedy the condition causing such inconsistency.

(b) HARDSHIP EXEMPTIONS.—(1) If any person enters into a contract with respect to a species of fish or wildlife or plant before the date of the publication in the Federal Register of notice of consideration of that species as [an endangered species and the subsequent listing of that species as an endangered species pursuant to section 4 of this Act] *an endangered species or a threatened species and the subsequent determination that the species is an endangered species or a threatened species under section 4* will cause undue hardship to such person under the contract, the Secretary, in order to minimize such hardship, may exempt such person from the application of [section 9(a) of this Act] *section 9(a)* to the extent the Secretary deems appropriate if such person applies to [him] *the Secretary* for such exemption and includes with such application such information as the Secretary may require to prove such hardship; except that (A) no such exemption shall be for a duration of more than one year from the date of publication in the Federal Register of notice of consideration of the species concerned, or shall apply to a quantity of fish or wildlife or plants in excess of that specified by the Secretary; (B) the one-year period for those species of [fish or wildlife listed by the Secretary as endangered] *fish or wildlife determined to be an endangered species or threatened species by the Secretary* prior to the effective date of this Act shall expire in accordance with the terms of section 3 of the Act of December 5, 1969 (83 Stat. 275); and (C) no such exemption may be granted for the importation or exportation of a specimen listed in Appendix I of the Convention which is to be used in a commercial activity.

(2) As used in this subsection, the term "undue economic hardship" shall include, but not be limited to:

(A) substantial economic loss resulting from inability caused by this Act to perform contracts with respect to species of fish and wildlife entered into prior to the date of publication in the Federal Register of a notice of consideration of such species as an endangered species *or a threatened species*;

(B) substantial economic loss to persons who, for the year prior to the notice of consideration of such species as an endangered species *or a threatened species*, derived a substantial portion of their income from the lawful taking of any [listed species] *endangered species or threatened species*, which taking would be made unlawful under this Act; or

* * * * * * *

(3) The Secretary may make further requirements for a showing of undue economic hardship as [he] *the Secretary* deems fit. Exceptions granted under this section may be limited by the Secretary in [his] *the Secretary's* discretion as to time, area, or other factor of applicability.

(c) NOTICE AND REVIEW.—The Secretary shall publish notice in the Federal Register of each application for an exemption or permit which is made under this section. Each notice shall invite the submission from interested parties, within [thirty] *45* days after the date of the notice, of written data, views, or arguments with respect to the application; except that such [thirty] *45*-day period may be waived by the Secretary in an emergency situation where the health or life of an endangered animal is threatened and no

reasonable alternative is available to the applicant, but notice of any such waiver shall be published by the Secretary in the Federal Register within ten days following the issuance of the exemption or permit. Information received by the Secretary as part of any application shall be available to the public as a matter of public record at every stage of the proceeding.

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

(e) ALASKA NATIVES.—(1) * * *

* * * * * * *

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

(f) *PRE-ACT PARTS AND SCRIMSHAW.*—(1) As used in this subsection—

(A) * * *

* * * * * * *

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

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

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

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

(A) * * *

* * * * * * *

(4) If the Secretary approves any application for exemption made under this subsection, [he] *the Secretary* shall issue to the applicant a certificate of exemption which shall specify—

(A) * * *

* * * * * * *

(g) *BURDEN OF PROOF IN SEEKING EXEMPTION OR PERMIT.*—In connection with any action alleging a violation of section 9, any person claiming the benefit of any exemption or permit under this Act shall have the burden of proving that the exemption or permit is applicable, has been granted, and was valid and in force at the time of the alleged violation.

(h) CERTAIN ANTIQUE ARTICLES.—(1) Sections 4(d), 9(a), and 9(c) do not apply to any article which—

(A) * * *

(B) is composed in whole or in part of any [endangered species or threatened species listed] *species determined to be an endangered species or a threatened species* under section 4;

* * * * * * *

(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.] *For purposes of this subsection, the term "experimental population" means any population (including any offspring arising therefrom) authorized by the Secretary for release under paragraph (2), but only when such population is in the area designated for it by the Secretary, and such area is, at the time of release, wholly separate geographically from areas occupied by nonexperimental populations of the same species. For purposes of this subsection, the term "areas occupied by nonexperimental populations" means areas characterized by the sustained and predictable presence of more than negligible numbers of successfully reproducing individuals over a period of many years.*

(2)(A) * * *

(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] *scientific data*, whether or not such population is essential to the continued existence of an endangered species or a threatened species.

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

[(i) solely] *that 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] *determined to be an endangered species or a threatened species* under section 4[; and

[(ii) critical habitat shall not be designated under this Act for any experimental population determined under subpara-

graph (B) to be not essential to the continued existence of a species.**]**.

* * * * * * *

(k) WRITTEN DETERMINATION OF COMPLIANCE.—(1) A property owner (in this subsection referred to as a "requester") may request the Secretary to make a written determination that a proposed use of the owner's property that is lawful under State and local law will comply with section 9(a), by submitting a written description of the proposed action to the Secretary by certified mail.

(2) A written description of a proposed use is deemed to be sufficient for consideration by the Secretary under paragraph (1) if the description includes—

(A) the nature, the specific location, the lawfulness under State and local law, and the anticipated schedule and duration of the proposed use, and a demonstration that the property owner has the means to undertake the proposed use; and

(B) any anticipated adverse impact to a species that is included on a list published under 4(c)(1) that the requestor reasonably expects to occur as a result of the proposed use.

(3) The Secretary may request and the requestor may supply any other information that either believes will assist the Secretary to make a determination under paragraph (1).

(4) If the Secretary does not make a determination pursuant to a request under this subsection because of the omission from the request of any information described in paragraph (2), the requestor may submit a subsequent request under this subsection for the same proposed use.

(5)(A) Subject to subparagraph (B), the Secretary shall provide to the requestor a written determination of whether the proposed use, as proposed by the requestor, will comply with section 9(a), by not later than expiration of the 180-day period beginning on the date of the submission of the request.

(B) The Secretary may request, and the requestor may grant, a written extension of the period under subparagraph (A).

(6) If the Secretary fails to provide a written determination before the expiration of the period under paragraph (5)(A) (or any extension thereof under paragraph (5)(B)), the Secretary is deemed to have determined that the proposed use complies with section 9(a).

(7) This subsection shall not apply with respect to agency actions that are subject to consultation under section 7.

(8) Any use or action taken by the property owner in reasonable reliance on a written determination of compliance under paragraph (5) or on the application of paragraph (6) shall not be treated as a violation of section 9(a).

(9) Any determination of compliance under this subsection shall remain effective—

(A) in the case of a written determination provided under paragraph (5)(A), for the 10-year period beginning on the date the written determination is provided; or

(B) in the case of a determination that under paragraph (6) the Secretary is deemed to have made, the 5-year period beginning on the first date the Secretary is deemed to have made the determination.

(10) The Secretary may withdraw a determination of compliance under this section only if the Secretary determines that, because of

unforeseen changed circumstances, the continuation of the use to which the determination applies would preclude conservation measures essential to the survival of any endangered species or threatened species. Such a withdrawal shall take effect 10 days after the date the Secretary provides notice of the withdrawal to the requester.

(11) The Secretary may extend the period that applies under paragraph (5) by up to 180 days if seasonal considerations make a determination impossible within the period that would otherwise apply.

(l) NATIONAL SECURITY.—The President, after consultation with the appropriate Federal agency, may exempt any act or omission from the provisions of this Act if such exemption is necessary for national security.

(m) DISASTER DECLARATION AND PROTECTION.—(1) The President may suspend the application of any provision of this Act in any area for which a major disaster is declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.).

(2) The Secretary shall, within one year after the date of the enactment of the Threatened and Endangered Species Recovery Act of 2005, promulgate regulations regarding application of this Act in the event of an emergency (including circumstances other than a major disaster referred to in paragraph (1)) involving a threat to human health or safety or to property, including regulations—

(A) determining what constitutes an emergency for purposes of this paragraph; and

(B) to address immediate threats through expedited consideration under or waiver of any provision of this Act.

PENALTIES AND ENFORCEMENT

SEC. 11. (a) CIVIL PENALTIES.—(1) Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of this Act, or any provision of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2(A), (B), (C), or (D), (c), (d), (other than regulation relating to recordkeeping or filing of reports), (f), or (g) of section 9 of this Act, may be assessed a civil penalty by the Secretary of not more than $25,000 for each violation. Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of any other regulation issued under this Act may be assessed a civil penalty by the Secretary of not more than $12,000 for each such violation. Any person who otherwise violates any provision of this Act, or any regulation, permit, or certificate issued hereunder, may be assessed a civil penalty by the Secretary of not more than $500 for each such violation. No penalty may be assessed under this subsection unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the

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

* * * * * * *

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

(b) CRIMINAL VIOLATIONS.—(1) * * *

* * * * * * *

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

* * * * * * *

(d) REWARDS AND CERTAIN INCIDENTAL EXPENSES.—The Secretary or the Secretary of the Treasury shall pay, from sums received as penalties, fines, or forfeitures of property for any violations of this chapter or any regulation issued hereunder (1) a reward to any person who furnishes information which leads to an arrest, a criminal conviction, civil penalty assessment, or forfeiture of property for any violation of this chapter or any regulation issued hereunder, and (2) the reasonable and necessary costs incurred by any person in providing temporary care for any fish, wildlife, or plant pending the disposition of any civil or criminal proceeding alleging a violation of this chapter with respect to that fish, wildlife, or plant. The amount of the reward, if any, is to be designated by the Secretary or the Secretary of the Treasury, as appropriate. Any officer or employee of the United States or any State or local government who furnishes information or renders service in the performance of [his] *the officer's or employee's* official duties is ineligible for payment under this subsection. Whenever the balance of sums received under this section and section 6(d) of the Act of November 16, 1981 (16 U.S.C. 3375(d)) as penalties or fines, or from forfeitures of property, exceed $500,000, the Secretary of the Treasury shall deposit an amount equal to such excess balance in the cooperative endangered species conservation fund established under section 6(i) of this Act.

(e) ENFORCEMENT.—(1) * * *

* * * * * * *

(3) Any person authorized by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, to enforce this Act may detain for inspection and inspect any package, crate, or other container, including its contents, and all accompanying documents, upon importation or ex-

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

* * * * * * *

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

* * * * * * *

(g) CITIZEN SUITS.—(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on [his] *the person's* own behalf—

(A) * * *

* * * * * * *

[CONFORMING AMENDMENTS

[SEC. 13. (a) Subsection 4(c) of the Act of October 15, 1966 (80 Stat. 928, 16 U.S.C. 668dd(c)), is further amended by revising the second sentence thereof to read as follows: "With the exception of endangered species and threatened species listed by the Secretary pursuant to section 4 of the Endangered Species Act of 1973 in States wherein a cooperative agreement does not exist pursuant to section 6(c) of that Act, nothing in this Act shall be construed to authorize the Secretary to control or regulate hunting or fishing of resident fish and wildlife on lands not within the system."

[(b) Subsection 10(a) of the Migratory Bird Conservation Act (45 Stat. 1224, 16 U.S.C. 715i(a)) and subsection 401(a) of the Act ofJune 15, 1935 (49 Stat. 383, 16 U.S.C. 715s(a)), are each amended bystriking out "threatened with extinction," and inserting in lieu thereof the following: "listed pursuant to section 4 of the Endangered Species Act of 1973 as endangered species or threatened species,".

[(c) Section 7(a)(1) of the Land and Water Conservation Fund Act of 1965 (16 U.S.C. 4601-9 (a)(1)) is amended by striking out:

"THRETENED SPECIES.—For any national area which may be authorized for the preservation of species of fish or wildlife that are threatened with extinction."

and inserting in lieu thereof the following:

["ENDANGERED SPECIES AND THREATENED SPECIES.—For lands, waters, or interests therein, the acquisition of which is authorized under section 5(a) of the Endangered Species Act of 1973, needed for the purpose of conserving endangered or threatened species of fish or wildlife or plants."

[(d) The first sentence of section 2 of the Act of September 28, 1962, as amended (76 Stat. 653, 16 U.S.C. 460k-1), is amended to read as follows:

["The Secretary is authorized to acquire areas of land, or interests therein, which are suitable for—

["(1) incidental fish and wildlife-oriented recreational development,

["(2) the protection of natural resources,

["(3) the conservation of endangered species or threatened species listed by the Secretary pursuant to section 4 of the Endangered Species Act of 1973, or

["(4) carrying out two or more of the purposes set forth in paragraphs (1) through (3) of this section, and are adjacent to, or within, the said conservation areas, except that the acquisition of any land or interest therein pursuant to this section shall be accomplished only with such funds as may be appropriated therefor by the Congress or donated for such purposes, but such property shall not be acquired with funds obtained from the sale of Federal migratory bird hunting stamps."

[(e) The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361-1407) is amended-

[(1) by striking out "Endangered Species Conservation Act of 1969" in section 3(1)(B) thereof and inserting in lieu thereof the following: "Endangered Species Act of 1973";

[(2) by striking out "pursuant to the Endangered Species Conservation Act of 1969" in section 101(a)(3)(B) thereof and inserting in lieu thereof the following: "or threatened species pursuant to the Endangered Species Act of 1973";

[(3) by striking out "endangered under the Endangered Species Conservation Act of 1969" in section 102(b)(3) thereof and inserting in lieu thereof the following: "an endangered species or threatened species pursuant to the Endangered Species Act of 1973"; and

[(4) by striking out "of the Interior such revisions of theEndangered Species List, authorized by the Endangered Species Conservation Act of 1969," in section 202(a)(6) thereof and inserting in lieu thereof the following: "such revisions of

the endangered species list and threatened species list published pursuant to section 4(c)(1) of the Endangered Species Act of 1973".

[(f) Section 2(l) of the Federal Environmental Pesticide Control Act of 1972 (Public Law 92-516) is amended by striking out the words "by the Secretary of the Interior under Public Law 91-135" and inserting in lieu thereof the words "or threatened by the Secretary pursuant to the Endangered Species Act of 1973".

[REPEALER

[SEC. 14. The Endangered Species Conservation Act of 1969 (sections 1 through 3 of the Act of October 16, 1966, and sections 1 through 6 of the Act of December 5,1969; 16 U.S.C. 668aa-666cc-6), is repealed.

[AUTHORIZATION OF APPROPRIATIONS

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

[(1) not to exceed $35,000,000 for fiscal year 1988, $36,500,000 for fiscal year 1989, $38,000,000 for fiscal year 1990, $39,500,000 for fiscal year 1991, and $41,500,000 for fiscal year 1992 to enable the Department of the Interior to carry out such functions and responsibilities as it may have been given under this Act;

[(2) not to exceed $5,750,000 for fiscal year 1988, $6,250,000 for each of fiscal years 1989 and 1990, and $6,750,000 for each of fiscal years 1991 and 1992 to enable the Department of Commerce to carry out such functions and responsibilities as it may have been given under this Act; and

[(3) not to exceed $2,200,000 for fiscal year 1988, $2,400,000 for each of fiscal years 1989 and 1990, and $2,600,000 for each of fiscal years 1991 and 1992, to enable the Department of Agriculture to carry out its functions and responsibilities with respect to the enforcement of this Act and the Convention which pertain to the importation or exportation of plants.

[(b) EXEMPTIONS FROM ACT.—There are authorized to be appropriated to the Secretary to assist him and the Endangered Species Committee in carrying out their functions under sections 7 (e), (g), and (h) not to exceed $600,000 for each of fiscal years 1988, 1989, 1990, 1991, and 1992.

[(c) CONVENTION IMPLEMENTATION.—There are authorized to be appropriated to the Department of the Interior for purposes of carrying out section 8A(e) not to exceed $400,000 for each of fiscal years 1988, 1989, and 1990, and $500,000 for each of fiscal years 1991 and 1992, and such sums shall remain available until expended.

[EFFECTIVE DATE

[SEC. 16. This Act shall take effect on the date of its enactment.]

PRIVATE PROPERTY CONSERVATION

SEC. 13. (a) IN GENERAL.—The Secretary may provide conservation grants (in this section referred to as "grants") to promote the voluntary conservation of endangered species and threatened species

by owners of private property and shall provide financial conservation aid (in this section referred to as "aid") to alleviate the burden of conservation measures imposed upon private property owners by this Act. The Secretary may provide technical assistance when requested to enhance the conservation effects of grants or aid.

(b) AWARDING OF GRANTS AND AID.—Grants to promote conservation of endangered species and threatened species on private property—

(1) may not be used to fund litigation, general education, general outreach, lobbying, or solicitation;

(2) may not be used to acquire leases or easements of more than 50 years duration or fee title to private property;

(3) must be designed to directly contribute to the conservation of an endangered species or threatened species by increasing the species' numbers or distribution; and

(4) must be supported by any private property owners on whose property any grant funded activities are carried out.

(c) PRIORITY.—Priority shall be accorded among grant requests in the following order:

(1) Grants that promote conservation of endangered species or threatened species on private property while making economically beneficial and productive use of the private property on which the conservation activities are conducted.

(2) Grants that develop, promote, or use techniques to increase the distribution or population of an endangered species or threatened species on private property.

(3) Other grants that promote voluntary conservation of endangered species or threatened species on private property.

(d) ELIGIBILITY FOR AID.—(1) The Secretary shall award aid to private property owners who—

(A) received a written determination under section 10(k) finding that the proposed use of private property would not comply with section 9(a); or

(B) receive notice under section 10(k)(10) that a written determination has been withdrawn.

(2) Aid shall be in an amount no less than the fair market value of the use that was proposed by the property owner if—

(A) the owner has foregone the proposed use;

(B) the owner has requested financial aid—

(i) within 180 days of the Secretary's issuance of a written determination that the proposed use would not comply with section 9(a); or

(ii) within 180 days after the property owner is notified of a withdrawal under section 10(k)(10); and

(C) the foregone use would be lawful under State and local law and the property owner has demonstrated that the property owner has the means to undertake the proposed use.

(e) DISTRIBUTION OF GRANTS AND AID.—(1) The Secretary shall pay eligible aid—

(A) within 180 days after receipt of a request for aid unless there are unresolved questions regarding the documentation of the foregone proposed use or unresolved questions regarding the fair market value; or

(B) at the resolution of any questions concerning the documentation of the foregone use established under subsection (f) or the fair market value established under subsection (g).

(2) All grants provided under this section shall be paid on the last day of the fiscal year. Aid shall be paid based on the date of the initial request.

(f) DOCUMENTATION OF THE FOREGONE USE.—Within 30 days of the request for aid, the Secretary shall enter into negotiations with the property owner regarding the documentation of the foregone proposed use through such mechanisms such as contract terms, lease terms, deed restrictions, easement terms, or transfer of title. If the Secretary and the property owner are unable to reach an agreement, then, within 60 days of the request for aid, the Secretary shall determine how the property owner's foregone use shall be documented with the least impact on the ownership interests of the property owner necessary to document the foregone use.

(g) FAIR MARKET VALUE.—For purposes of this section, the fair market value of the foregone use of the affected portion of the private property, including business losses, is what a willing buyer would pay to a willing seller in an open market. Fair market value shall take into account the likelihood that the foregone use would be approved under State and local law. The fair market value shall be determined within 180 days of the documentation of the foregone use. The fair market value shall be determined jointly by 2 licensed independent appraisers, one selected by the Secretary and one selected by the property owner. If the 2 appraisers fail to agree on fair market value, the Secretary and the property owner shall jointly select a third licensed appraiser whose appraisal within an additional 90 days shall be binding on the Secretary and the private property owner. Within one year after the date of enactment of the Threatened and Endangered Species Recovery Act of 2005, the Secretary shall promulgate regulations regarding selection of the jointly selected appraisers under this subsection.

(h) LIMITATION ON AID AVAILABILITY.—Any person receiving aid under this section may not receive additional aid under this section for the same foregone use of the same property and for the same period of time.

(i) ANNUAL REPORTING.—The Secretary shall by January 15 of each year provide a report of all aid and grants awarded under this section to the Committee on Resources of the House of Representatives and the Environment and Public Works Committee of the Senate and make such report electronically available to the general public on the website required under section 14.

PUBLIC ACCESSIBILITY AND ACCOUNTABILITY

SEC. 14. The Secretary shall make available on a publicly accessible website on the Internet—

(1) each list published under section 4(c)(1);

(2) all final and proposed regulations and determinations under section 4;

(3) the results of all 5-year reviews conducted under section 4(c)(2)(A);

(4) all draft and final recovery plans issued under section 5(a), and all final recovery plans issued and in effect under section 4(f)(1) of this Act as in effect immediately before the enact-

ment of the Threatened and Endangered Species Recovery Act of 2005;

(5) all reports required under sections 5(e) and 16, and all reports required under sections 4(f)(3) and 18 of this Act as in effect immediately before the enactment of the Threatened and Endangered Species Recovery Act of 2005; and

(6) data contained in the reports referred to in paragraph (5) of this section, and that were produced after the date of enactment of the Threatened and Endangered Species Recovery Act of 2005, in the form of databases that may be searched by the variables included in the reports.

MARINE MAMMAL PROTECTION ACT OF 1972

SEC. [17] *15*. Except as otherwise provided in this Act, no provision of this Act shall take precedence over any more restrictive conflicting provision of the Marine Mammal Protection Act of 1972.

[ANNUAL COST ANALYSIS BY THE FISH AND WILDLIFE SERVICE

[SEC. 18. Notwithstanding section 3003 of Public Law 104–66 (31 U.S.C. 1113 note; 109 Stat. 734), on or before January 15, 1990, and each January 15 thereafter, the Secretary of the Interior, acting through the Fish and Wildlife Service, shall submit to the Congress an annual report covering the preceding fiscal year which shall contain—

[(1) an accounting on a species by species basis of all reasonably unidentifiable Federal expenditures made primarily for the conservation of endangered or threatened species pursuant to this Act; and

[(2) an accounting on a species by species basis for all reasonably identifiable expenditures made primarily for the conservation of endangered or threatened species pursuant to this Act by States receiving grants under section 6.]

ANNUAL COST ANALYSIS BY UNITED STATES FISH AND WILDLIFE SERVICE

SEC. 16. (a) IN GENERAL.—On or before January 15 of each year, the Secretary shall submit to the Congress an annual report covering the preceding fiscal year that contains an accounting of all reasonably identifiable expenditures made primarily for the conservation of species included on lists published and in effect under section 4(c).

(b) SPECIFICATION OF EXPENDITURES.—Each report under this section shall specify—

(1) expenditures of Federal funds on a species-by-species basis, and expenditures of Federal funds that are not attributable to a specific species;

(2) expenditures by States for the fiscal year covered by the report on a species-by-species basis, and expenditures by States that are not attributable to a specific species; and

(3) based on data submitted pursuant to subsection (c), expenditures voluntarily reported by local governmental entities on a species-by-species basis, and such expenditures that are not attributable to a specific species.

(c) ENCOURAGEMENT OF VOLUNTARY SUBMISSION OF DATA BY LOCAL GOVERNMENTS.—The Secretary shall provide a means by which local governmental entities may—

(1) voluntarily submit electronic data regarding their expenditures for conservation of species listed under section 4(c); and

(2) attest to the accuracy of such data.

REIMBURSEMENT FOR DEPREDATION OF LIVESTOCK BY REINTRODUCED SPECIES

SEC. 17. (a) IN GENERAL.—The Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, may reimburse the owner of livestock for any loss of livestock resulting from depredation by any population of a species if the population is listed under section 4(c) and includes or derives from members of the species that were reintroduced into the wild.

(b) ELIGIBILITY FOR AND AMOUNT.—Eligibility for, and the amount of, reimbursement under this section shall not be conditioned on the presentation of the body of any animal for which reimbursement is sought.

(c) LIMITATION ON REQUIREMENT TO PRESENT BODY.—The Secretary may not require the owner of livestock to present the body of individual livestock as a condition of payment of reimbursement under this section.

(d) USE OF DONATIONS.—The Secretary may accept and use donations of funds to pay reimbursement under this section.

(e) AVAILABILITY OF APPROPRIATIONS.—The requirement to pay reimbursement under this section is subject to the availability of funds for such payments.

AUTHORIZATION OF APPROPRIATIONS

SEC. 18. (a) IN GENERAL.—There are authorized to be appropriated to carry out this Act, other than section 8A(e)—

(1) to the Secretary of the Interior to carry out functions and responsibilities of the Department of the Interior under this Act, such sums as are necessary for fiscal years 2006 through 2010; and

(2) to the Secretary of Agriculture to carry out functions and responsibilities of the Department of the Interior with respect to the enforcement of this Act and the convention which pertain the importation of plants, such sums as are necessary for fiscal year 2006 through 2010.

(b) CONVENTION IMPLEMENTATION.—There is authorized to be appropriated to the Secretary of the Interior to carry out section 8A(e) such sums as are necessary for fiscal years 2006 through 2010.

MARINE MAMMAL PROTECTION ACT OF 1972

* * * * * * *

TITLE I—CONSERVATION AND PROTECTION OF MARINE MAMMALS

* * * * * * *

PERMITS

SEC. 104. (a) * * *

* * * * * * *

(c)(1) * * *

* * * * * * *

(4)(A) A permit may be issued for enhancing the survival or recovery of a species or stock only with respect to a species or stock for which the Secretary, after consultation with the Marine Mammal Commission and after notice and opportunity for public comment, has first determined that—

(i) * * *

(ii) taking or importation is consistent (I) with any conservation plan adopted by the Secretary under section 115(b) of this title or any recovery plan developed under [section 4(f)] *section 5* of the Endangered Species Act of 1973 for the species or stock, or (II) if there is no conservation or recovery plan in place, with the Secretary's evaluation of actions required to enhance the survival or recovery of the species or stock in light to the factors that would be addressed in a conservation plan or a recovery plan.

* * * * * * *

STATUS REVIEW; CONSERVATION PLANS

SEC. 115. (a) * * *

(b)(1) * * *

(2) Each plan shall have the purpose of conserving and restoring the species or stock to its optimum sustainable population. The Secretary shall model such plans on recovery plans required under [section 4(f) of the Endangered Species Act of 1973 (16 U.S.C. 1533(f))] *section 5 of the Endangered Species Act of 1973*.

* * * * * * *

ADDITIONAL VIEWS

ADDITIONAL VIEWS OF CONGRESSMAN DON YOUNG

For too long, the Endangered Species Act has been used not as a tool for protecting the environment but as a roadblock. The original intent of species protection has been lost by those eager to wield the ESA's power for legal and bureaucratic ensnarement. The problems with the current Act ensure that it will remain primarily used in this dilatory role instead of its higher calling.

I particularly applaud the improvement to the scientific standards included in H.R. 3824: The Threatened and Endangered Species Recovery Act. My fellow Alaskans, for instance, have told me of wildlife counts drastically at odds with government agency findings, but the Act's unclear definition of "best available" allows information gathered during airplane fly-overs to count more than the on the ground reality as found by those who live there.

While the Federal Government has failed to recover endangered species to healthy and sustainable populations, it has unfortunately not failed to cause massive hardship for landowners and communities while pursuing this so far widely unobtained goal. A better approach is needed—for plants, wildlife, and humans. I applaud Chairman Pombo and his efforts on this urgent matter.

DON YOUNG.

ADDITIONAL VIEWS OF REPRESENTATIVE MARK UDALL

While I have strongly supported the Endangered Species Act, I have never rejected the idea of changing it.

On the contrary, I have repeatedly said that I thought it would be possible to improve the way it was implemented.

So, I regret that I was unable to support H.R. 3824 as ordered reported by the Resources Committee.

I don't think the bill is all bad. I like the idea of putting more emphasis on recovery plans and on steps to provide incentives for landowners and other private parties to help with recovering species. And there are other provisions that I think are acceptable or even desirable.

Unfortunately, though, to my mind the bill's defects are still so numerous and so serious that it does not deserve to be favorably reported as it stands. It simply isn't ready for prime time on the floor of the House.

That was why I offered an amendment to retain protections for species listed as "threatened" and why I joined with the gentleman from New Mexico, Mr. Pearce, in offering an amendment to authorize the fish and wildlife service to compensate ranchers for livestock lost to an endangered predator that has been reintroduced into the wild—something I supported to help ensure fair treatment for ranchers where those reintroductions take place or where those predators may relocate themselves. I am pleased that the Committee adopted those amendments.

In addition, I voted for a number of amendments that would have made other improvements in the bill. If all those amendments had been adopted, I would have a much higher opinion of the bill.

Regrettably, that did not happen, and the legislation's other flaws meant that I could not vote to approve the bill.

However, I take hope from the fact that the vote on reporting the bill will not be the last vote on this legislation. And, as the legislative process goes forward, I will continue to do what I can to maintain essential protections for endangered species while working to improve the way those protections are implemented.

MARK UDALL.

DISSENTING VIEWS

Enacted in 1973, the Endangered Species Act (ESA) has demonstrated that it is possible to protect our country's heritage and at the same time effectively compete in a global economy. H.R. 3824 will unravel the progress this Nation has made in sparing from extinction more than 1,200 species, including the bald eagle and grizzly bear, on their way to recovery, and the brown pelican, American Peregrine Falcon and gray whale, which have recovered.

Those who argue that the law is a failure because it has not recovered more species do not understand that the Endangered Species Act was never intended as a quick fix to protect our favorite species. It is the law of last resort when other State and Federal laws fail to result in species conservation. The true value of the Endangered Species Act lies in the intricacies of life itself.

The Endangered Species Act has been amended several times. There are administrative remedies available to address most, if not all, the reasonable issues that have been raised about the law. But there is no justification for H.R. 3824, except for the expedience of a short-sighted political agenda. H.R. 3824 would establish precedents we strongly oppose.

PESTICIDE WAIVER

H.R. 3824 would repeal the Endangered Species Act provisions that protect threatened and endangered species from the harmful impacts of pesticides. Have we forgotten that it was the pesticide DDT that was largely responsible for the demise of our Nation's most enduring symbol, the American bald eagle? Pesticides have also been blamed for poisoning the salmon in the Pacific Northwest, and are suspected of playing a key role in the recent dramatic decline of fish populations in California's San Francisco Bay/Sacramento-San Joaquin Delta.

Yet, H.R. 3824 would insulate those who use pesticides from the Endangered Species Act's prohibitions against killing endangered and threatened species. Additionally, it would waive the requirements in Section 7 of ESA that Federal agencies consult with the National Oceanic and Atmospheric Administration's National Marine Fisheries Service or Fish and Wildlife Service (Services) to determine the effects that a proposed action may have on listed species. As long as corporations and Federal agencies comply with the Federal Insecticide, Fungicide and Rodenticide Act, they will have no further obligation to meet the requirements in the Endangered Species Act.

Notwithstanding the billions of dollars this country has spent to restore estuaries and waterways, from the Chesapeake Bay to the Everglades and San Francisco Bay/Sacramento-San Joaquin Delta, this provision would lift prohibitions in place to protect drinking

water quality, fisheries and wildlife. The economic and environmental implications of this provision are staggering.

PAYMENT FOR ESA COMPLIANCE

Under the misleading label "conservation grants," Section 14 creates a new, potentially open-ended entitlement program for property developers and speculators. Section 14 would establish the dangerous precedent that private individuals must be paid in order to comply with an environmental law designed to protect the public interest in preserving endangered species

Under Section 14, the Services would be put in an untenable position where enforcement of the Endangered Species Act would generate countless compensation claims and virtually unlimited liability against the agencies and Federal taxpayers.

The "takings" clause of the Fifth Amendment to the Constitution states: "[N]or shall private property be taken for public use, without just compensation." However, under the provisions of Section 14, property developers would be compensated for government actions which do not constitute takings under the Fifth Amendment. The Majority's intent to disregard the long-standing principles of Fifth-amendment based compensation was made clear by their rejection of Mr. Inslee's amendment.

If the "pay people to comply with the law" language of Section 14 were applied to local zoning, no Mayor or city council could govern a community without facing fear that a decision might drive the community into financial ruin. Among its many flaws, Section 14 redefines "fair market value" to include speculative "business losses" and allows for compensation of "no less than fair market value" even if only a portion of the property is affected by the government action.

Ironically, Section 14 provides no assurance that the new compensation program would lead to greater conservation or recovery of endangered species. The far greater likelihood is an unwarranted windfall for land developers, and speculators, and their lawyers at an enormous cost to the taxpayers and budget deficit.

ALTERNATIVE CONSULTATION PROCEDURES

H.R. 3824 cuts the heart out of the Section 7 consultation process, the lynchpin of the ESA. H.R. 3824 allows the Secretary of the Interior or Commerce to delegate those responsibilities to other Federal agencies through undefined procedures. Section 12 imposes no standards for these procedures, thus potentially allowing destructive Federal activities to proceed without the normal review by the scientists with wildlife expertise. The only justification given for this provision is that the Services have a heavy workload. This problem could be addressed if additional resources for ESA compliance were allocated to the responsible agencies, a solution repeatedly suggested in testimony before the Committee.

Those tasked with determining the effects of a proposed agency action would be forced to wear blinders when considering whether a species is in jeopardy of extinction. Under existing law, the Services consider the condition of the species at the time the proposed action would be carried out. If other projects are also negatively im-

pacting the species, the Services address their cumulative effects when evaluating whether the species is in trouble. Yet H.R. 3824 forbids the Services from taking these baseline conditions into account. The Services will be obligated to ignore reality and base their decision on fiction. There is a real risk that this provision could allow political expediency to override the concerns of qualified agency scientists.

Once the Secretary of the Interior or Commerce has entered into a cooperative agreement with a State, H.R. 3824 limits the applicability of the Section 7 consultation provisions in the ESA to the time when the agreement is renewed or amended. If it is found that the agreement results in the harm or jeopardy of a listed species, it is questionable whether consultation would have to be reinitiated. There is no requirement that the cooperative agreement meet any meaningful conservation standard.

JEOPARDY DEFINITION

While we are highly critical of H.R. 3824, we believe that including a statutory definition of "jeopardize the continued existence" of listed species is a step in the right direction. The existing regulatory definition in 50 CFR 402.02 allows agency actions to proceed unless they impede both the "survival and recovery" of a listed species. This definition allows too many species to totter on the brink of extinction. A species that is merely surviving is clearly not recovering.

The statutory definition of what constitutes jeopardy in H.R. 3824 prohibits any agency action that is likely to make species' conservation significantly less likely in the long-term. The term "long-term" will allow the Secretary to balance the proven long-term benefits of an action intended to promote the species' conservation against potential short term negative impacts in assessing whether jeopardy is likely to occur. For example, prescriptive-burning or other active habitat management may be necessary to ensure a species' conservation in the long-term, even though such management actions may cause short-term adverse impacts to individual members of a species. It is expected that a species' recovery plan, including the identification in such plans of habitat necessary for the conservation of the species, is to factor significantly in making a jeopardy determination during the Section 7 consultation process.

The bill replaces the Secretary's obligation to designate critical habitat for listed species with a new obligation to identify in a species' recovery plan that habitat which is of special value for the conservation of the species. It is expected that an endangered or threatened species' recovery plan, including the identification in such plan of areas of special value to the conservation of the species, will factor significantly in making a jeopardy determination during the Section 7 consultation process. In the absence of a meaningful recovery plan or criteria or where the Secretary has determined that he or she cannot yet ascertain recovery criteria, the jeopardy analysis shall be informed by the proposed agency action's likely impact on achieving interim recovery criteria, if any, and the extent to which the proposed agency action is likely to impact the species' current status and potential prospects for recovery.

CONCLUSION

Notwithstanding our support for the inclusion of a statutory definition of jeopardy, we strongly oppose H.R. 3824 which will undermine any progress this country has seen in species recovery. There is no justification to overhaul the law in this way, and its enactment will likely result in more species extinctions and greater costs to the taxpayer.

We cannot know what currently unforeseen miracles of science and medicine reside in the small, seemingly insignificant life forms which surround us. But modern medicine has saved untold numbers of lives by gaining a deeper understanding of life forms. If we wish for human life to continue, we must recognize that our lives are inextricably woven with all other life.

None among us fully understands the complex design of life on earth. Until we do, we should preserve God's wonders in all their forms. It is not for us to decide which pieces of God's plan meet our standards, which should survive, and which should be extinguished for our convenience and pleasure.

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ADDITIONAL DISSENTING VIEWS OF REPRESENTATIVES MARKEY, PALLONE, INSLEE, AND GRIJALVA

In addition to the concerns that we have about other objectionable components of the bill approved by the Resources Committee, we would also like to address specifically the provisions in H.R. 3824 that deal with the designation of habitat. This bill eliminates the mandatory and enforceable designation of a listed species' critical habitat that is in current law. Instead, section 10 of this bill directs the Secretary to create recovery plans for listed species that include identification of areas of "special value" to a species' conservation. Replacing the current mandatory designation and protection of critical habitat with a recovery plan, which continues to lack regulatory force, represents a dangerous shift in policy that would significantly undermine the protection and recovery of threatened and endangered species.

Designating critical habitat for listed species is an integral part of a species' continued existence and recovery. A major factor forcing threatened and endangered species towards extinction is the loss and deterioration of habitat necessary for survival. We cannot expect a species to recover without first ensuring that it has the habitat in which to do so.

One example of the necessity and success of critical habitat designation is the case of the whooping crane. The whooping crane is a bird that was at the brink of extinction—at one point there were only 16 in the wild. Enforcement action under the critical habitat protection led to the protection of the bird's designated migratory path along the Platte River and now there are over 200 wild whooping cranes.

The critical habitat designation is the only part of the current law that protects the entire habitat needed for the recovery of a species. Under the current law, Federal agencies and private actors within a Federal nexus must refrain from "adverse modification" of critical habitat. There is no provision in this bill that similarly expressly protects a species' habitat. To mandate that areas of special value be identified but then to prevent the enforcement of the protection of those areas, will simply result in the filing of plans that have no regulatory effect. It would create a blizzard of unenforceable bureaucratic paperwork which, in the words of Shakespeare, would be "full of sound and fury but signifying nothing."

We strongly oppose the elimination of critical habitat requirements as an enforceable feature of our national law to protect endangered species and urge that habitat designations and protections be strengthened as the bill moves forward.

EDWARD J. MARKEY.
JAY INSLEE.
FRANK PALLONE, JR.
RAÚL M. GRIJALVA.

APPENDIX

Implementation of the Endangered Species Act of 1973

Report to the House Committee on Resources
Richard W. Pombo, Chairman
Majority Staff 109th Congress
May 2005

**This report has not been officially adopted by the Committee on Resources*

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I. Executive Summary

There is increasing recognition from most quarters that the Endangered Species Act (ESA) needs to be improved. Exactly what those improvements should be is less uniform. This report examines the implementation of selected aspects of the endangered species program relying predominately on information provided by the primary implementing agencies, the United States Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) and offers some recommendations for possible improvements to the program.

Debate over the ESA has traditionally been highly polarized. For example, compensating landowners for takings or reductions in property value has been opposed by some who argue updating the law to address this is not necessary. While consensus on other issues such as the need for increasing conservation incentives and the role states play in endangered species conservation has begun to emerge, one of the most debated aspects of ESA implementation continues to be whether the ESA is effectively conserving endangered and threatened species.

While there have been significant strides in conserving individual species such as the whooping crane, red-cockaded woodpecker and gray wolf, few species have been delisted (removed from the endangered list) or downlisted (changed in status from endangered to threatened) because of successful ESA conservation efforts. Some argue that the number of recovered species is an unfair measure, asserting that the three decades the ESA has been in existence is an insufficient amount of time for the lengthy process of species recovery and point to listed species that have not gone extinct as evidence the ESA 'saves' species. From the opposing perspective, while recovery to the point of delisting may require a substantial amount of time for many species, after three decades more progress should be demonstrable through species that have recovered and been delisted. Even if a species has increased in numbers or distribution or the threats facing the species have been reduced, if it has not been delisted on the basis of recovery, the ESA's prohibitions and regulations remain applicable and the ESA should not be a 'one way street.'

Of 40 total species removed from the list, 10 domestic species were delisted because of "recovery". Of 33 reclassified species, 10 domestic downlistings (a change from endangered to threatened status) reflected a reduced threat assessment which also allowed more flexibility in management. The FWS's most recent report to Congress (Fiscal years 2001-2002) shows that 77 percent of listed species fall in the 0 to 25 percent recovery achieved bracket and 2 percent fall in the 76 to 100 percent recovery achieved bracket. 39 percent of the FWS managed species are of uncertain status. Of those with an assessed trend, at one end of the spectrum are 3 percent possibly extinct, 1 percent occurring only in captivity and 21 percent declining and at the other end are 30 percent stable and 6 percent improving. These assessments however are subjective. Additionally, the assessment that a species is improving or stable may reflect, for example, a reduction in perceived threats or corrections to inaccurate threat assessments that stemmed from erroneous data rather than actual changes in species' trends that are demonstrated by

improved numbers, distribution or other such measurements. Consequently, a meaningful assessment of conservation trends under the ESA using these data is not possible.

The data used to list a number of species has been subsequently determined to be erroneous and species that likely do not merit classification as endangered or threatened remain listed. This can consume resources that could be directed to species that do merit listing. The assignment of recovery priorities appears highly skewed and the recovery priority for some species seems questionable. A meaningful distinction between endangered status and threatened status has been blurred as has been the framework for the mechanism of critical habitat. Expenditure reporting has improved but presents an incomplete picture of financial resources dedicated to endangered species. Workloads for litigation regarding activities such as consultation and listing under the ESA's complex structure compete for resources that could otherwise be directed at recovery efforts. The demands associated with ESA Section 4 determinations in combination with the pace of species listings and delistings, the number of possible future additions to the list and the economic impact of listings likely indicate that the current program is not sustainable.

II. Overview

Currently there are some 1,264 domestic endangered and threatened species listed under the ESA. Additionally, there are 562 foreign ESA listed species. The vast majority of these species fall under the jurisdiction of the FWS. The remaining are under the jurisdiction of NMFS or are managed jointly by the two agencies.

Since the ESA was enacted, there have been ten domestic species delisted as recovered. For three of the 10 recovered species (American peregrine falcon, arctic peregrine falcon and brown pelican) the banning of DDT was a cause, if not the primary cause in recovery according to the FWS. Erroneous data regarding population numbers, population trend, distribution or reproductive potential led to an initially overestimated threat for six of ten recovered species including the alligator, brown pelican, gray whale, Hoover's woolly star, Tinian monarch and, to a lesser extent, the Aleutian Canada goose. One recovered species, the Columbian white-tailed deer, was delisted over a part of its range and remains endangered in the remainder of its range. Several recovered species including the Columbian white-tailed deer, Aleutian Canada goose and alligator benefited from limitations placed on harvesting. Several species (Aleutian Canada goose, American peregrine falcon and the plant Robbins' cinquefoil) benefited from conservation activities that included eradication of predators, introductions, cultivation, transplanting and habitat management. Similarly, ten domestic species were reclassified as threatened based upon a reduced threat assessment.

Pursuant to the ESA, the FWS and NMFS are to produce a Report to Congress every two years that provides information about recovery efforts directed at listed species. The FWS report includes data on the "status" and "recovery achieved" of listed species as well as other information. As of the FWS's most recent report, a majority of listed species (63 percent) are considered to be of uncertain or declining status or are possibly extinct. While some 36 percent are considered stable or improving, these

assessments (like that of declining) are in large part 'guesstimates'. Further, assessments of stable or improving do not necessarily indicate what they would seem to indicate. The values stable or improving can indicate that a negative population trend has been halted or that there been a measurable increase in the numbers or distribution of a species. However, these values can also indicate that earlier data regarding the species has been subsequently determined to be erroneous.

For example, data gathered after listing showed that there were not some 1,500 individual specimens of Johnston's frankenia, a plant, as was believed at the time of listing but more than 9,000,000. This species was assessed as improving in the most recent FWS report and has been proposed for delisting.

Such improving or stable assessments may also indicate that what biologists perceived as a threat, such as the 'inadequacy of existing regulatory mechanisms' has been reduced because property ownership changed, management contracts were negotiated, or other laws or regulations affecting the species were enacted. For example, Hoover's woolly star, another plant that was significantly undercounted at the time of listing and eventually delisted, was assessed as stable in the FWS's most recent Report to Congress. The species was considered to be stable in part because of the newly discovered specimens and in part because of conservation agreements with landowners.

By another FWS measurement, "recovery achieved", 93percent of species fall in the 0-50percent range and 77percent fall in the 0-25percent range. On the other end of the scale, the FWS reports that only 2percent of listed species (25) fall in the 76percent or more recovery achieved range. In fact, as of the most recent report, there were more listed species that were possibly extinct (35) than there were species in the 76percent or more recovery achieved range (25).

As with the status measurement, the recovery achieved measurement may also reflect factors such as new information that reveals original listing data was in error. It is important to recognize that an assessment that, for example, a listed species is improving following the discovery that the species is more abundant is not just misleading 'spin'. The assessment of a species' status and the actions remaining to achieve recovery are tied to threat based assessments. If, for example, a species' known numbers increase due to new surveys, then the threat may be reassessed. An increase in known numbers or distribution may show the species to be closer to recovery criteria than previously believed. Populations discovered on public property may be believed by biologists to be more secure than those previously known only from private property. Consequently, the threat may be considered reduced and goals of establishing secure populations are less difficult to meet. In such cases the species may be assessed as improving or be moved to a higher recovery achieved bracket.

At the same time, it is important to remember that such changes in information about the species, while valuable in management decisions, do not reflect actual improvement of the species' condition but a correction to earlier erroneous data. Existing law requires listing determinations to be made based on the "best scientific and commercial data available." 'Best' is a qualitative and comparative term and currently

presents a low threshold. This standard can and does lead to listing of species based on incorrect assessments of the threats species face.

As of the FWS's most recent Report to Congress, some 3 percent of listed species are assessed as 'possibly extinct' and only two of these have been subsequently delisted. (It should be noted that the vast majority of these possible extinctions likely occurred prior to listing and in cases prior to the enactment of the ESA). One of these, the ivory-billed woodpecker has been recently 'rediscovered.'

Historically, more species have been delisted and downlisted following the determination that original data was erroneous than have been delisted and downlisted on the basis of a reduced threat or recovery. There are likely a number of other currently listed species that should also be delisted or downlisted on the basis of erroneous data. The listing of species that do not merit endangered or threatened status can consume conservation resources from species that are actually endangered or threatened.

For example, the process for removing species that were added to the list on the basis of erroneous data, or that are believed to be extinct, is essentially the same as it would be for any other species requiring proposed and final rules. The FWS estimates the approximate average cost range to publish proposed and final rules to implement any such determination to be $75,000 - $125,000 and $50,000 - $140,000 respectively.

Listed species that do not merit continued endangered or threatened classification may trigger other costs as well, as was the case with the Preble's meadow jumping mouse, a species the FWS recently proposed for delisting. An economic impact assessment accompanying the critical habitat designation for this species estimated costs to be $79 – $183 million over ten years. These costs fall upon other governmental agencies and private parties.

Another example of costs resulting from species listed with erroneous data is some 248 federal actions that were reviewed for their effects upon Eggert's sunflower. This species is now proposed for delisting because the numbers and distribution of the species were underestimated (increasing from 34 known sites at the time of listing to 279 known sites) and the threats to the species were overestimated (the species may actually benefit from human activities such as forest thinning and brush clearing as it occurs in disturbed areas). The FWS was also compelled to reconsider its determination not to designate critical habitat for this species after being sued by the Southern Appalachian Biodiversity Project. The FWS again determined it would not be prudent to designate critical habitat when it proposed delisting the species on the basis of erroneous data.

Expenditures of resources on species which do not merit listing also increases the burdens on agencies that already carry large workloads in terms of listing, a process driven in large part by litigation, consultation, permitting and other ESA activities. As regards the litigation workload, the FWS reports in its most recent budget justifications that the agency faces 34 active lawsuits with respect to 48 species, 40 court orders involving 88 species, and 36 notices of intent to sue involving 104 species. This litigation workload was reported only with respect to the program's listing activities.

The FWS reports that the consultation workload for Fiscal Year 2004 included over 71,000 informal consultations and over 4,000 formal consultations. The consultation requirements of the ESA also significantly affect other agencies, and in cases, appear unduly burdensome. For example, among incidents reported by US Forest Service and Bureau of Land Management officials was a consultation that regarded allowing a Native American tribe to harvest a single cedar tree for use as a ceremonial canoe. It required about two years.

Even without the volume of litigation affecting the listing program, the potential resources demanded by the listing process are huge. Using *the low end* of the FWS's average cost ranges for proposed and final listing regulations, designation of critical habitat and performing accompanying economic and NEPA assessments, a simplistic cost projection for the 283 current candidate species exceeds $150 million. These activities occur at the front end of the program and are followed by other program actions like recovery, consultation and law enforcement that consume a much larger share of the implementing agencies' budgets. To put this cost in perspective, the FWS's Fiscal Year 2004 budget for listing (which includes critical habitat designation) was $12.1 million, providing a strong indication that the current process is not sustainable, especially in the current budget atmosphere.

The FWS also produces annual reports detailing expenditures on listed species. The reports have improved significantly in recent years but clearly still fail to include many ESA costs born by federal and state agencies that are within the scope of the reports. Additionally, the report's scope as provided by law, fails to capture large expenditures on endangered and threatened species, including those born by counties, cities, businesses and private persons.

In the most recent reports, FWS and NMFS ESA expenditures are well under half of all Federal expenditures. The FWS and the NMFS expenditures are substantially exceeded by those reported by other Federal agencies even though these other agencies' expenditures are likely underreported. Particularly noteworthy among recently reported Federal expenditures are the Bonneville Power Administration's reported Fiscal Year 2001 expenditures approaching $1.7 billion during the West Coast energy crisis. Most of these costs are passed on through increases in power rates.

Economic analyses conducted in association with critical habitat designations have indicated similarly large potential costs. For example, economic analyses conducted for the California tiger salamander, California gnatcatcher, and a group of West Coast species fell in a range of about $100 million to $1.3 billion.

The cost of the ESA is clearly measured in billions but an accurate accounting of Federal, state and private expenditures is not determinable with currently available data. Critical habitat may have its most significant impact in California where more than 10 percent of the state has been included in just the FWS's critical habitat designations even though the FWS questions the conservation value of these designations. Agency regulations inconsistent with statute and conflicting court rulings have muddled the application of critical habitat designation to conservation.

Other available data reveal that species ranked as being at the very highest priority level are not generally among those receiving the largest expenditures. The assessments of priorities for individual species, however, is in question given a highly lopsided distribution toward higher priority rankings (over 92 percent of species have been accorded priorities putting them in the upper half of the FWS's ranking system). Many species that have recovery plans that appear to indicate poor recovery prospects have recovery priorities that indicate a high recovery potential. Similarly, 38 percent of the species that have a recovery potential indicating a "low" degree of threat are classified as endangered rather than threatened.

While some species have clearly benefited from the ESA, three decades after the Act's passage few species have been delisted or downlisted because of effective ESA conservation efforts. With well under half of 1,264 listed species considered stable or improving and the vast majority of listed species falling in the 0 to 25 percent recovery achieved bracket, it seems unlikely that the slow pace of delisting and downlisting will change substantially in the near future.

The data that are now available in the Report to Congress are essentially qualitative and are subjective to the degree that in cases they constitute 'guesstimates.' Additionally, what may appear to be improvements are, in many instances, actually corrections of erroneous data. Consequently, although the ESA has been in effect for more than three decades, the available data cannot be used to meaningfully assess any overall conservation effects of the endangered species program. The reports produced by the FWS and the NMFS could be substantially improved to facilitate better assessment of the effects of and better management of the endangered species program.

Current expenditure reporting has improved but could be further improved. Expenditures under the ESA are much larger than as is revealed by the endangered species budgets of the primary implementing agencies and the greatest share of federal expenditures comes from other than the primary implementing agencies. Although these reports document substantial expenditures, current reporting provides an incomplete picture. Some of the largest identifiable costs of the endangered species program are those reported in critical habitat economic impact assessments that fall upon other governmental agencies and private parties.

Review of the program indicates that stronger scientific standards deigned to reduce the number of species listed on the basis of erroneous data are needed to prevent waste of conservation funds and unnecessary economic impacts. Means of reducing the regulatory burden of the current delisting/downlisting process with regard to species listed on erroneous data, or that are believed extinct, could increase the funds available for other program activities such as recovery as could provisions that reduce the litigation workload imposed on the implementing agencies. This could also improve the program's credibility. Addressing these issues might allow many talented endangered species biologists to dedicate more time to recovery work in the field and to improving the ESA's recovery record.

III. Introduction

The Endangered Species Act (ESA) was enacted in 1973.[1] While authorization of appropriations for the Act expired in 1993, the ESA has continued to have the force of law through annual appropriations. The endangered species program administered by the FWS and the NMFS has been in effect for more than three decades.[2] The term "species" under the ESA is a legal term that also includes in its definition subspecies and distinct vertebrate population segments. Biologists do not see these three terms as equivalent. Full species can be identified by a Latin binomial (two-part name) such as with the bald eagle (*Haliaeetus leucocephalus*), and subspecies can be identified by their Latin trinomial (three-part name) such as with the Preble's meadow jumping mouse (*Zapus hudsonius preblei*). A distinct population segment may often be identified by references to a "population of" or "DPS" such as with the gray wolf.[3]

As of February 14, 2005, the FWS reported that some 1,264 domestic species were on the endangered list.[4] Of the FWS's 9,500 authorized full time employees for Fiscal Year 2004, an estimated 533 positions were attributed to the endangered species account, with estimated expenses at 136.9 million.[5] The NMFS reports 2,648 full time employees operating under a FY04 budget of $785 million, with 523 working under the ESA account and a FY04 budget of about $101 million.[6]

The FWS and the NMFS budgets for ESA work are often cited as evidence of a small investment being made in an endangered species program by those who hold that the law is generally sound but has been underfunded. While not many species have been removed from the endangered species list, some assert that it has been effective in saving species from extinction. There are deficiencies in the available data that inhibit some assessments of the endangered species program, but there is enough data to review aspects of ESA implementation.

Oversight and investigations staff reviewed FWS and NMFS information including the biannual Report to Congress on the Recovery of Threatened and Endangered Species and annual Species by Species Expenditures Reports,[7] information regarding endangered species that have been delisted (removed from a list of endangered and threatened species[8]) and reclassified (changed in status from endangered to threatened or vise versa), information regarding critical habitat and from endangered species recovery plans and other endangered species program data provided by the FWS and the NMFS.

IV. Delisted Species

The FWS's most recent Report to Congress on the recovery program recognizes that "[t]he primary purpose of the Endangered Species Act of 1973 ... is the conservation of endangered and threatened species and the ecosystems upon which they depend. *The ultimate goal of such conservation efforts is the recovery of endangered and threatened species, so that they no longer need the protective measures afforded by the Act.*"[9] (emphasis added)

Under ESA regulations the Secretary may remove species "...if such data substantiate that it is neither endangered nor threatened for one or more of the following reasons: (1) *extinction*... (2) *recovery* ... a point at which protection under the Act is no longer required... (3) *original data* for classification in *error*."[10] (emphasis added). While regulations equate the point at which a species no longer requires protection under the ESA with "recovery," the statute does not require that the species' numbers or distribution be returned to some historic peak but only to the point at which the factors used to determine endangered or threatened status are no longer met.

Forty species have been removed from the endangered species list since the ESA was enacted. These include both foreign and domestic species and species that were determined to have recovered, gone extinct and to have been added to the list on the basis of erroneous data. (Based on the FWS delisting notice, Hoover's woolly star, a plant, is counted twice below. It is counted once among "recovered" and once among species being delisted on the basis of "erroneous data." (See Appendix 1.))

Seven foreign species were delisted on the basis of recovery or erroneous data (See notes 11-13):

- Eastern gray kangaroo (*Macropus giganteus*)[11]
- red kangaroo (*Macropus rufus*)
- Western gray kangaroo (*Macropus fuliginosus*)
- Indian flap-shelled turtle (*Lissemys punctata punctata*)[12]
- Palau ground dove (*Gallicolumba canifrons*)[13]
- Palau fantail flycatcher (*Rhipidura lepida*)
- Palau owl (*Pyroglaux podargina*)

Nine domestic delisted species were delisted due to extinction:

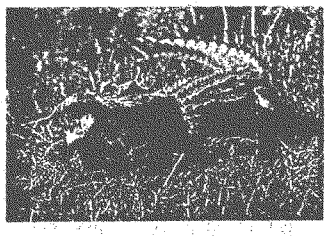
- Guam broadbill (*Myiagra freycineti*)[14]
- longjaw cisco (*Coregonus alpenae*)[15]
- amistad gambusia (*Gambusia amistadensis*)[16]
- Mariana mallard (*Anas oustaleti*)[17]
- Sampson's pearlymussel (*Epioblasma sampsoni*)[18]
- blue pike (*Stizostedion vitreum glaucum*)[19]
- Tecopa pupfish (*Cyprinodon nevadensis calidae*)[20]
- Santa Barbara song sparrow (*Melospiza melodia graminea*)[21]
- dusky seaside sparrow (*Ammodramus maritimus nigrescens*)[22]

Fifteen domestic species were delisted due to erroneous data (see notes 23-37):

- Bahama swallowtail butterfly (*Heraclides andraemon bonhotei*)[23]
- Cuneate bidens (*Bidens cuneata*)[24]
- Lloyd's hedgehog cactus(*Echinocereus lloydii*)[25]
- Mckittrick pennyroyal (*Hedeoma apiculatum*)[26]
- Mexican duck (*Anas "diazi"*)[27]
- purple-spined hedgehog cactus (*Echinocereus engelmannii var. purpureus*)[28]
- Pine Barrens tree frog (*Hyla andersonii*)[29]

- Rydberg milk-vetch (*Astragalus perianus*)[30]
- Southeastern dismal swamp shrew (*Sorex longirostris fisheri*)[31]
- spineless hedgehog cactus (*Echinocereus triglochidiatus var. inermis*)[32]
- Truckee barberry (*Berberis (=Mahonia) sonnei*)[33]
- Tumamoc globeberry (*Tumamoca macdougalii*)[34]
- coastal cutthroat trout (Umpqua River) (*Oncorhynchus clarki clarki*)[35]
- gray wolf) (*Canis lupus*) (grey wolves remain listed under the ESA; this action reflected the "delisting of all other lower 48 states or portions of lower 48 states not otherwise included in the 3 distinct population segments")[36]
- Hoover's woolly star *(Eriastrum hooveri)*[37]

The following ten domestic species were determined to have recovered.



American Alligator (*Alligator mississippiensis*): Technically "threatened by similarity of appearance,"[38] the alligator was first listed as threatened with extinction in 1967 under a law that preceded the ESA of 1973.[39] It was delisted as a 'recovered' species on June 4, 1987.[40]
The alligator's population dynamics were misunderstood at the time of listing. Writing for the National Wildlife Federation, T.A. Lewis recognized that the "familiar and gratifying" recovery story of the alligator was "mostly wrong."[41]

American Peregrine Falcon (*Falco peregrinus anatum*): The falcon was first listed on June 2, 1970 and delisted on August 25, 1999.[42] According to the FWS, "[t]he most significant factor in the recovery of the peregrine falcon was the restriction placed on the use of organochlorine pesticides. The use of DDT was banned in Canada in 1970 and in the United States in 1972…" the FWS also states, "[i]n the eastern United States, where peregrine falcons were extirpated, the initial recovery objective was to reestablish peregrine falcons through the release of offspring from a variety of wild stocks being held in captivity by falconers. The first experimental releases of captive-produced young occurred in 1974 and then in 1975 in the United States. Since then, approximately 6,000 falcons were released throughout its historic range in North America. These releases helped to re-establish breeding pairs in areas where the species was extirpated, and accelerated the recovery of the species."

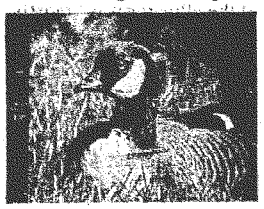
"The peregrine restoration was the largest species recovery program ever accomplished, extending throughout much of North America, lasting more than three decades, and even including collaboration with Europeans," according to the leading experts on peregrine falcons.[43] In a recent paper, these experts state:

> Why did Peregrine Restoration succeed? First and foremost, the cause of the decline of the species (DDT) was greatly reduced in the environment. Second, about 7,000 falcons were released to the wild where peregrine populations were extirpated or greatly reduced…This was facilitated by widespread cooperation

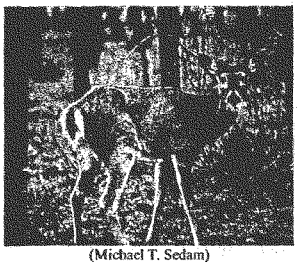
and support led by a core group of dedicated peregrine enthusiasts, mostly falconers, who possessed considerable knowledge about the species. Peregrine restoration was largely a privately led enterprise. Third, state wildlife departments and federal land management agencies contributed importantly to the recovery program…

Fourth, although restoration of the peregrine would have occurred even if the ESA had not existed, it is unlikely to have achieved the same level of success. The ESA provided a platform for cooperation, particularly among government agencies, and added a new source of funding, although much of it was consumed by government bureaucracy and not used for actual recovery implementation. Section 6 funding may have been the most important financial aspect for overall recovery. An annual appropriation earmarked by Congress for the Peregrine Fund for a number of years was also very important and enhanced our level of participation…Finally, despite the FWS having the authority for implementing the ESA, and a number of their biologists contributing importantly to the recovery program, as an agency the FWS had a limited role, and its law enforcement division, which was in charge of issuing permits as well as enforcing regulations, was regularly an obstacle to recovery actions (Burnham and Cade 2003b).

Aleutian Canada Goose (*Branta canadensis leucopareia*): The Aleutian Canada goose was listed on March 11, 1967 and delisted on March 20, 2001.[44] Regarding this Canada goose subspecies, the FWS states,"[a]t the time of its listing, data on which to base a population estimate of Aleutian Canada geese were limited. Boeker … speculated during a 1963 expedition that only 200– 300 birds were on Buldir Island. We believed breeding birds to be confined to that one island, and the migration routes and wintering range were uncertain. A spring count at a principal migration stopover near Crescent City, California, in 1975 revealed 790 individuals… We subsequently found small breeding groups of Aleutian Canada geese on Kiliktagik Island … and on Chagulak …" the FWS also states that,"[t]he decline of the Aleutian Canada goose was primarily the result of the introduction of Arctic foxes … and, to a lesser extent, red foxes … to its breeding islands" and that "removal of foxes from potential nesting islands" was one of the important features of the recovery program. According to the Service, "[i]nitial population increases of Aleutian Canada geese were likely in response to hunting closures in California and Oregon to protect the geese during migration and during winter. However, a substantial increase in numbers was dependent on reestablishing geese on former nesting islands. … Once the number of geese on Buldir Island was large enough, we initiated translocation of wild geese from Buldir Island to other fox-free islands… As new breeding colonies became established in the Aleutian Islands, the number of Aleutian Canada geese increased rapidly."



Arctic Peregrine Falcon (*Falco peregrinus tundrius*): The falcon was listed June 2, 1970 and delisted on October 5, 1994.[45] According to the FWS, "[f]ollowing restrictions on the use of organochlorine pesticides, reproductive rates in arctic peregrine falcon populations increased and populations began to expand by the mid- to late- 1970s. By 1984, the recovery of arctic peregrine falcons had progressed sufficiently that the USFWS reclassified the subspecies from endangered to threatened...The number of arctic peregrine falcons continued to increase. By 1991, the USFWS announced that it was reviewing the status of the threatened arctic peregrine falcon to determine if a proposal to delist was appropriate..."



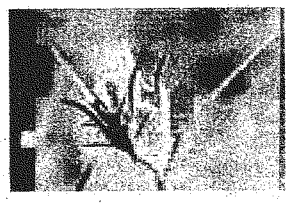
(Michael T. Sedam)

Columbian White-tailed Deer (*Odocoileus virginianus leucurus*): One of 30 subspecies of white-tailed deer in North and Central America, this deer inhabiting counties in Oregon and Washington was first listed as endangered in 1967. Only those occurring in Oregon's Douglas County (a distinct population segment) were delisted on July 24, 2003.[46] The deer remains designated as endangered in Columbia, Clark, Cowliz, Pacific, Skamania, and Wahkiakum Counties in Washington and in Clatsop, Columbia, and Multnomah Counties in Oregon.[47]

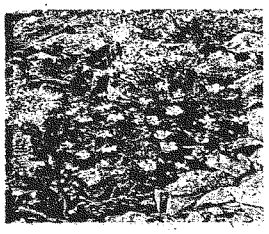
1978 amendments to the ESA introduced the term distinct population segment (DPS), a term not originating in biology but in law. This classification is reserved to vertebrates and legislative history reveals it was to be used sparingly.[48] According to the FWS, the distinct population segment of the subspecies in Douglas County has recovered primarily because of "...habitat acquisition and management for the deer, hunting restrictions, and the application of local ordinances, designed to protect the Douglas County DPS."

Eastern Population of Brown Pelican (*Pelecanus occidentalis*): The pelican was listed on June 2, 1970 and delisted on July 5, 1984.[49] According to the FWS: "[p]opulation data gathered since the listing have questioned the likelihood that the pelican population in Florida was ever endangered, as defined by the Act. This designation was also questionable for the pelican in South Carolina. The data was not in existence at the time of listing and the most prudent course of action, based upon the best available data at that time, was to list the entire species as endangered." According to the FWS, "organochlorine pesticide pollution apparently contributed to the endangerment of the pelican."

Gray Whale (*Eschrichtius robustus*): The gray whale was listed as endangered June 2, 1970 and delisted on June 16, 1994.[50] Although the species population is high in the Pacific, some trend data may indicate that its population has been growing since 1890, over 80 years prior to the enactment of the ESA.[51]



Hoover's woolly-star (*Eriastrum hooveri*): Hoover's woolly-star was first listed on July 19, 1996 and delisted on October 7, 2003.[52] Although delisted in part on the basis of recovery, according to the FWS, "[a] total of 1,128 new sites have been found on BLM land. Along with the increase in the number of sites, the distribution and range of [Hoover's woolly star, a plant] has increased...The species has greater abundance, range and distribution than previously thought."



Robbins' cinquefoil (*Potentilla robbinsiana*): This flower was listed on September 17, 1980 and delisted on August 27, 2002.[53] According to the FWS, factors contributing to the recovery of Robbins' cinquefoil, included transplanting to establish and augment populations and rerouting of a hiking trail.

Tinian monarch (*Monarcha takatsukasae*): This bird was first listed on June 2, 1970 and delisted on September 21, 2004.[54] According to the 1987 FWS notice reclassifying this bird from endangered to threatened status, "[b]iologists who have visited Tinian over the last 10 years have commented on the general abundance of the monarch (Owens 1974; Pratt et al. 1979), and the forest bird surveys conducted by the Service in 1982 found the monarch to be the second most abundant bird on the island with a population estimate of 40,000..." Although this bird was delisted on the basis of recovery, one of the above citations regarding the Tinian monarch's abundance is dated only one year after the ESA was enacted.

V. Reclassified Species

All species reclassified by the FWS as of December 2004 were reviewed to determine the degree to which these reclassifications reflect progress in recovering species and what kinds of actions contributed to improving these species' statuses. Under the ESA, species are reclassified by downlisting from endangered to threatened or elevated from threatened to endangered. Downlisting indicates that the threats faced by the species are believed to have been reduced while elevating a species from threatened to endangered indicates the opposite. Consequently, downlisting species because threats have actually been reduced can indicate improvement of the status of a species' condition.

Given the age of the ESA and the current number of listed species, the 33 reclassifications as of December 2004 provide limited evidence of progress. Erroneous data was a contributing factor in at least ten of 19, or over 50percent of the downlisted domestic species. Among the ten domestic downlisted species that were not primarily attributable to erroneous data, non-regulatory management activities such as the use of hatcheries, propagation, cultivation, transplanting, reintroductions, and predator control were contributing factors in a majority of cases. In eight of ten cases downlisting allowed more flexible management permitted with listing as a threatened species rather than as an endangered species. More rigid endangered species restrictions can hinder management.[55]

Breakdown of the 33 reclassified species

- Six species were reclassified from threatened to endangered indicating that threats faced by the species were increased:

  -Schaus swallowtail butterfly (*Heraclides aristodemus ponceanus*)[56]
  -Alabama cavefish (*Speoplatyrhinus poulsoni*)[57]
  -chinook salmon (fall Snake River) (*Oncorhynchus (=Salmo) tshawyscha*)
  -chinook salmon (spring/summer Snake River) (*Oncorhynchus (=Salmo) tshawyscha*)[58]
  -chinook salmon (winter Sacramento River) (*Oncorhynchus (=Salmo) tshawyscha*)[59]
  -Steller sea-lion (western population) (*Eumetopias jubatus*)[60]

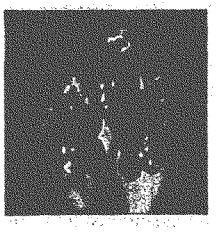
- Eight reclassified species are foreign:

  -argali (*Ovis ammon*)[61]
  -Yacare caiman (*Caiman yacare*)[62]
  -chimpanzee (wild) (*Pan troglodytes*)
  -chimpanzee (captive) (*Pan troglodytes*)
  -pygmy chimpanzee (*Pan paniscus*)[63]
  -Nile crocodile (*Crocodylus niloticus*)[64]
  -saltwater crocodile (*Crocodylus porosus*)[65]
  -leopard (*Panthera pardus*)[66]

- Nine domestic species were downlisted in whole or in part because earlier data was shown to be erroneous:

  -Mariana fruit bat (=Mariana Flying Fox) (*Pteropus mariannus mariannus*)[67]
  -Missouri bladderpod (*Lesquerella filiformis*)[68]
  -Siler pincushion cactus (*Pediocactus (=Echinocactus, =Utahia) sileri*)[69]
  -Maguire daisy (*Erigeron maguirei*)[70]
  -snail darter (*Percina tanasi*)[71]
  -MacFarlane's four-o'clock (*Mirabilis manfarlanei*)[72]
  -Louisiana pearlshell (*Margaritifera hembeli*)[73]
  -small whorled pogonia (*Isotria medeoloides*)[74]
  -large-flowered skullcap (*Scutellaria montana*)[75]

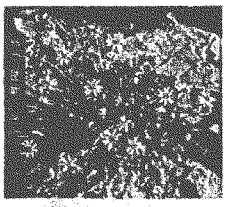
Data gathered after these species were included on the ESA list revealed erroneous original data as regards the threat facing the species including possible underestimations of a species' population, numbers or distribution data. These factors justified reclassification.



MacFarlane's Four-O'clock: listed in October, 1979, surveys increased known plants from 725 to 7,212.

Large-flowered skullcap: listed in June, 1986, surveys increased known plants from 6,700 to more than 50,000.

Maguire daisy: listed in September, 1985, two varieties formerly considered distinct were combined, substantially increasing the distribution and abundance of the taxon.



Missouri bladderpod: listed in January, 1987, surveys increased known sites from 4 to 63.

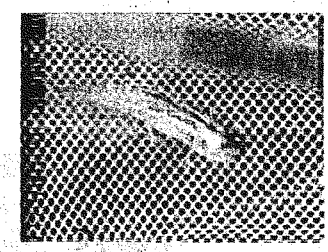
Small whorled pogonia: listed in September, 1982, surveys increased known sites from 17 to 104.

Downlisting Based on Reduced Threats

Ten domestic species were downlisted because their statuses improved which improved management flexibility with regard to several of these species.

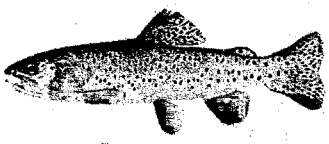
Bald eagle (*Haliaeetus leucocephalus*): The bald eagle was determined to be endangered in the lower 48 states in 1967, and was downlisted on March 11, 1995. The bald eagle is found throughout the lower 48 states and in other parts of North America. Its reclassification reflects a rather dramatic improvement of the species status. Like the peregrine, much of the improvement is generally attributed to the ban on DDT. The FWS has placed a high priority on eagle conservation activities and expended substantial resources on the species. The bald eagle has rebounded sufficiently that, despite its continued listing, many experts do not believe it is biologically threatened. A recent paper by birds of prey experts states, "[t]he bald eagle, for example, was originally proposed by FWS for delisting 10 years ago, but action has been held up by those who are concerned about the adequacy of habitat protection after the eagle is removed from the list – a misapplied application of the "precautionary principle."[76]

Gray wolf (*Canis lupus*): Gray wolves were first listed as endangered in 1967. Two gray wolf DPS's were downlisted in 2003. The reclassification reflected substantial growth in numbers, and a reduction in what was believed to be the historic range of the eastern DPS. The reclassifications also allowed more flexible management (taking "problem" wolves to respond to wolf – human conflict) that has been anticipated to increase as more wolves dispersed from well established core areas.[77]

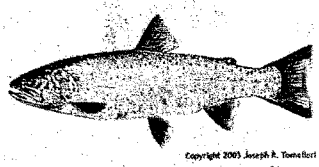


Tiger salamander (*Ambystoma californiense*): California tiger salamanders were listed as endangered in 2000 and downlisted to threatened in 2004. Changing the salamander's status from endangered to threatened reflected the combining of groups of salamanders that had previously been treated separately. Reclassification also improved management flexibility. Listing tiger salamanders as threatened allowed the FWS to promulgate what is known as a 4d rule. The rule exempted routine ranching practices from the ESA's "take' prohibition. On the whole, ranching is viewed as beneficial to these salamanders in its impact as this kind of land use provides suitable habitat and stock ponds where breeding may occur. An endangered status which prohibits take of species backed by threat of civil and criminal prosecution is viewed as discouraging ranching and thereby encouraging the conversion of ranching land into uses more deleterious to the species. [78]

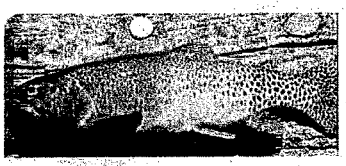
Four trout species: Apache trout (*Oncorhynchus apache trout*), Lahontan cutthroat trout (*Oncorhynchus clarki henshawi*), Paiute cutthroat trout (*Oncorhynchus clarki seleniris*)[79], and greenback cutthroat trout (*Oncorhynchus clarki stomias*)[80]: The Apache trout was listed in 1967 and inhabits Arizona. The Lahontan cutthroat was listed in 1970 and inhabits California, Utah, Nevada and Oregon. The greenback cutthroat and Paiute cutthroat were listed in 1967 and inhabit Colorado and California respectively. The reclassification of these four trout species reflected captive propagation in hatcheries, introductions of fish into the wild, habitat restoration and control of brown and rainbow trout. All these trout subspecies are game fish and threatened status also allows sport fishing.



Apache Trout[81]



Lahontan Cutthroat Trout[82]



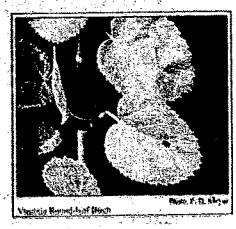
Greenback Cutthroat Trout[83]

Paiute Cutthroat Trout[84]

(www.eniature.com)

Utah prairie dog (*Cynomys parvidens*): The Utah prairie dog which was listed as endangered in 1973 and downlisted to threatened in 1984, occurs in Utah as implied by its common name. The reclassification of this rodent reflects identification of additional populations, the transplant of growing extant populations to other sites and allowed promulgation of 4d rule so populations could be controlled.[85]

Virgina round leaf birch (*Betula uber*): The Virginia round leaf birch, a species of tree known to occur in Virginia, was listed as endangered in 1978 and downlisted in 1994. The reclassification of this tree reflects recovery actions such as cultivation and transplanting of specimens as well as preservation of germ plasma. Additionally, information reported in the rule downlisting the Virginia round leaf birch indicated a close relationship to the sweet birch.[86]



VI. Report to Congress

The ESA requires a report to be produced and provided to Congress every two years on the status of efforts to develop and implement recovery plans and on the status of all species for which plans have been developed. The FWS also chooses to provide information regarding species for which recovery plans have not been developed in its "Report to Congress."

Generally, the FWS report includes a narrative assessment of the program and overview of the data provided for the relevant species. The FWS report includes information specific to each listed species including:

- the FWS region with lead responsibility for the species
- the dates of the species' first/final recovery plan and of the most current recovery plan (when applicable) as well as the stage of development of the recovery plan (finals, draft, revision)
- the species' current listing classification (endangered or threatened)
- the species' recovery priority number
- the species' status trend and
- a value indicating a percentage range of recovery that has been achieved.

Unless otherwise indicated, the following information is drawn from the FWS reports that cover a larger number of species than the NMFS report.

Recovery Priority

Recovery priorities are assigned to each species on a scale from 1 to 18. The numbers are based upon the degree of perceived threat faced by a species, the species' recovery potential and taxonomic distinctness. Threats are categorized as 'high,' 'medium' or 'low' and recovery potential is categorized as 'high' or 'low.' Species (as legally defined) are considered on the basis of the taxonomic divisions of monotypic species, species and subspecies. DPS's are generally considered with subspecies. Animals or plants that are more highly distinctive or represent isolated gene pools are ranked higher (i.e. monotypic species are prioritized over species that belong to a genus with several species, which are prioritized above subspecies and DPS's). Furthermore, the addition of 'c,' to any priority number indicates a listed plant or animal is in conflict with human activities. A species in conflict is ranked above a species that has an equivalent numerical rank but is not in conflict.

Figure 1

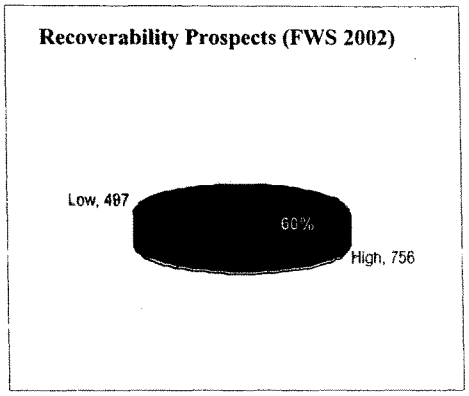


Figure 2

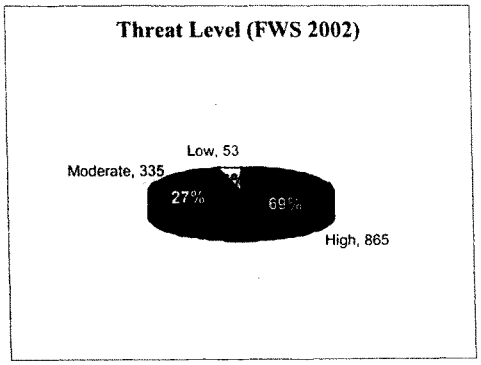


Table 1

FWS Listings by Priority

Threat Degree	Recovery[87] Potential	Rank	Number[88]	Taxon
high	high	1	23	monotypic
	high	2	275	species
	high	3	122	subspecies
	low	4	16	monotypic
	low	5	351	species
	low	6	78	subspecies
moderate	high	7	12	monotypic
	high	8	202	species
	high	9	75	subspecies
	low	10	0	monotypic
	low	11	39	species
	low	12	7	subspecies
low	high	13	2	monotypic
	high	14	38	species
	high	15	7	subspecies
	low	16	0	monotypic
	low	17	5	species
	low	18	1	subspecies

92 percent of the species covered in the FWS report fall in the upper half of the ranking system between (i.e. recovery priority 1 to 9). In fact, over 69percent of the species covered by the report fall in the top 6 of 18 ranks. **The fact that 92percent are in the upper half of the ranking system raises questions with regard to the individual assignment of the threat values, the ranking system or both.** Similarly, **about 38 percent of the species that are classified as facing a 'low' threat are species that are listed as 'endangered' rather than 'threatened.'** Despite this, according to the FWS, "[t]he distinction between Threatened and Endangered species occurs in the Degree of Threat criterion. It is generally understood that the degree of threat is greater for Endangered species than for Threatened species."[89]

Recovery Achieved

Recovery achieved data is to provide an "estimate of the extent to which the recovery objectives for each species has been achieved."[90] According to the FWS this measurement is neither the "proportion of the number of discrete actions in the recovery plan that have been completed (e.g., 33 actions out of 100)," nor an assessment that "one

of four objectives have been met." According to the FWS, recovery achieved reflects the overall progress towards the recovery goal of downlisting (a change in status from endangered to threatened) or delisting. Recovery achieved is indicated with a value ranging from 1 to 4 that corresponds to the following percentile intervals:

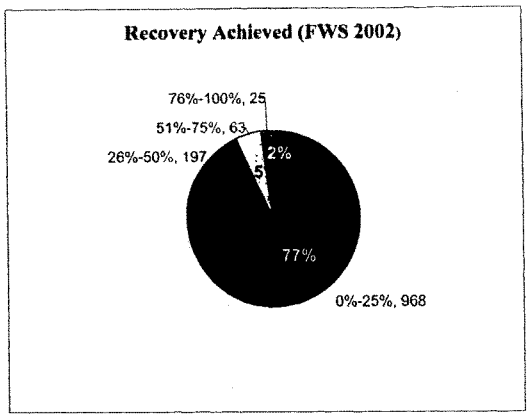
1 = 0 -25 percent	recovery achieved
2 = 26 -50 percent	recovery achieved
3 = 51 -75 percent	recovery achieved
4 = 76 -100 percent	recovery achieved

In the FWS's 2002 report, 25 species or 2 percent ranked recovery achieved 4 or in the 76 - 100 percent bracket. There are species within this group such as the bald eagle that have increased substantially in number and distribution and for which many threats have been significantly reduced. However, **the recovery achieved measure is subjective and higher achievement may also reflect factors other than actual reductions in the threat faced by a species. Higher recovery achieved rankings may reflect factors such as a reduction in a perceived threat through the establishment of regulations or laws that alleviate what biologists believed were 'inadequate regulatory mechanisms.' Higher rankings may also reflect corrections to inaccurate threat assessments resulting from erroneous data that indicated that the species was less plentiful or less widely distributed than it actually is.** Such new information **may result in the assessment that a species is closer to meeting goals, objectives or criteria than previously believed.** A number of the 25 species in the highest recovery achieved bracket were found to be more abundant and/or widespread after listing. This is the case, for example, with the Uinta Basin hookless cactus, [91] running buffalo clover, [92] Truckee barberry, [93] Eggert's sunflower[94] and Johnston's frankenia.[95] In fact, the latter three have been or are proposed for delisting because new information revealed earlier data was erroneous.

For example, Johnston's frankenia, a plant occurring in Texas, was reported to have achieved 76 percent or more of its recovery objectives in the FWS 2002 Report to Congress. Johnston's frankenia was listed in 1984 and data at the time indicated there were some 1,500 individual specimens. Since listing, surveys have resulted in a population estimate of greater than 9,000,000 individual plants.[96]

Other 'recovery achieved - 4' species include the Tinian monarch, Hawaiian hawk, and Virginia round leaf birch. The threat to the Tinian monarch, as addressed previously, was overestimated. This may also be the case with the Hawaiian hawk. FWS actually proposed downlisting this bird in 1993 and the proposal recounts the speculative nature of the species' assumed decline. The notice also reveals the hawk has adapted to altered habitat and may include invasive species in its prey base.[97] The Virginia round leaf birch, also previously addressed, is in this group as well. For about 25 percent or more of the species in the highest recovery achieved bracket, erroneous data was a contributing factor to the ranking.

Figure 3



Species Status

Species status is a qualitative assessment of the trend in the threats faced by and numbers of a species. The possible values range from 'possibly extinct' to 'improving' and include[98]:

I = Improving: species that have numerically increased while threats were constant or reduced; or, a species that has had constant numbers and reduced threats.

S = Stable: numbers and threats have been constant.

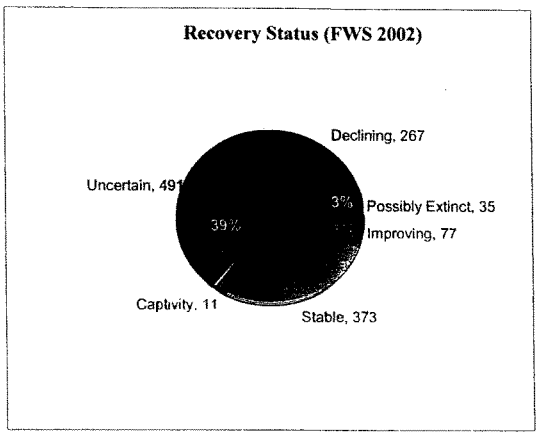
D = Declining: decreasing in numbers and/or increasing threats.

U = Uncertain: current trend uncertain.

C = Captivity: species known only from captive individuals / populations.

E = Possibly Extinct.

Figure 4



As few species have been delisted and downlisted, the status of species is often referred to as a means of measuring the performance of the ESA. According to a recent paper in Conservation Biology, "[d]espite the small number of officially recovered species, the ESA ***may have*** effectively prevented as many as 192 extinctions (Schwartz 1999)."[99] (emphasis added) Making such statements with a caveat is prudent. The same paper reports, "[t]he quality of these data is inconsistent and of questionable accuracy, however, because trends for some species ***are simply the best guesses*** of USFWS personnel (Boersma et al. 2001)." (emphasis added)

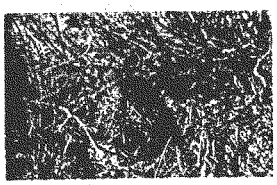
In its 2002 report, the FWS indicated the status of some 77 species (or 6 percent) was 'improving' while 373 species or 30 percent were "stable." Among these are some of the higher profile species such as the grizzly bear, whooping crane, red-cockaded woodpecker and California condor, all of which have benefited from conservation efforts.

The assignment of the status "stable" or "improving" for a species may, however, reflect factors other than actual increases in the species' numbers or distribution, or the reduction of accurately assessed threats. Rather such **a "stable" or "improving" status may indicate a reduction in perceived threats resulting from the establishment of "adequate regulatory mechanisms" or even new data that shows earlier assessments of threats faced by a species that were based upon an underestimated population or distribution are in error.** For example, among the species reported to be improving or stable in the FWS's 2002 report are the gray bat, Ozark big-eared bat, Virginia big-eared bat, Virginia northern flying squirrel, Utah prairie dog, Virgin Islands tree boa, Ozark cavefish, snail darter, cheat mountain salamander, American burying beetle, flat-spired three-toothed snail, *geocarpon minimum*, Hoover's woolly-star, large-flowered skullcap, Macfarlane's four o'clock, Maguire daisy, Missouri bladderpod, northeastern bulrush, Pitcher's thistle, running buffalo clover, small-whorled pogonia, swamp pink, watercress

darter and Uinta Basin hookless cactus.[100] After being listed the numbers or distribution of all of these species was shown to be greater than originally believed.

As regards the swamp pink, the 1992 Report to Congress indicated that after listing, "[a]pproximately 20 previously unknown populations have been discovered in New Jersey," "Five previously unknown swamp pink occurrences have been located in Delaware" and in North Carolina there was a "...discovery of a spruce bog population consisting of 100,000 plants on Forest Service lands."[101]

Similarly, the 2002 report indicates that the Uinta Basin hookless cactus, which has been listed since 1979 as threatened is stable. In fact, this cactus has been consistently classified as stable and the 1990 Report to Congress indicated that original data used in listing this species was inaccurate enough that the "[p]ossibility of delisting [the Uinta Basin hookless cactus would] be evaluated based on new information on species abundance."[102]



Uinta Basin hookless cactus

The same 1990 report indicated that, "[p]opulation and habitat inventories have identified a greater abundance, range distribution, and additional populations of [the Wright fishhook cactus] than originally known" and states, "[e]valuation will be undertaken to consider delisting." This species is also classified as stable in the 2002 report.

Of the above improving and stable examples the change in earlier erroneous data was significant enough to contribute to the downlisting or delisting of the snail darter, Hoover's woolly-star, large-flowered skullcap, Macfarlane's four o'clock, Maguire daisy, Missouri bladderpod and small-whorled pogonia as has been previously addressed.

The 2002 report also classifies some 3 percent of or 35 listed species covered by the Report as "possibly extinct." The recovery plan for three mussels that are assessed as possibly extinct states, "[t]he ultimate goal... is to locate, maintain, and enhance any known populations..." but that "it is highly improbable, if and when living specimens of any one of the three subject species are found that... the species can ever recover to the point of delisting."[103]

Of the 35 species that are possibly extinct all but one, Frostburg's love grass, have been listed more than a decade. Twenty-two have been listed for more than two decades and half of these were listed under a law that preceded the Endangered Species Act of 1973. Some of these species have likely been extinct for decades, even prior to passage of the ESA. Since the 2002 report, only two of the possibly extinct species, the Guam broadbill and Mariana mallard, have been delisted. Other species that are assessed as unknown may be extinct. For example, FWS Threatened and Endangered Species Database System (TESS) indicates that the Maryland darter which is assessed as uncertain in the 2002 report is possibly extinct.[104]

Several considerations likely affect the FWS treatment of species that are possibly extinct. For example, the FWS must consider the possibility that the species could be 'rediscovered.' A recent and dramatic example of this was the discovery of ivory-billed woodpeckers that had not been reliably documented since the 1940s.

Museum specimen of the ivory-billed woodpecker

Of all the species assessed as possibly extinct, the ivory-billed woodpecker would, in some respects, be one of the least likely to evade detection and do so for decades. This is a large bird, similar in size to a crow, and the largest woodpecker in the United States. It has a somewhat striking appearance given its size, large wingspan, distinctive white and black markings and colored crest. While, the ivory-billed woodpecker can be mistaken for another similar woodpecker, it can be distinguished by its physical features as well as by its flight pattern and vocalizations. The type of habitat the species occurs in is known and a breeding pair is believed to require about three square miles of habitat. These facts about the bird are well known to birders and with an implicit reference to rediscovering the bird, the ivory-billed woodpecker has been referred to by some as the 'holy grail'. While the ivory-billed woodpecker's historic range is large and the species' habitat can be difficult to survey, considerable effort over many years has been exerted by both wildlife officials and numerous avid birders to find any living specimens. While reports had surfaced over the decades there had been no documentation of living ivory-billed woodpeckers accepted as reliable until recently.

The fact that the existence of this species escaped detection for decades raises an obvious question about the reliability of data regarding the numbers and distribution of other species that have not been extensively searched for, are recognized by far fewer people and about which there is less life history information. While this question is applicable to species that have been classed as possibly extinct, it also applies to many other species that have or may have been determined to be endangered on the basis of erroneous data like Johnston's frankenia, Hoover's woolly star.

In addition to the possibility of rediscovering a species, FWS may consider delisting actions in the context of other ESA program demands. Further, delisting a large number of species, approaching the total number of delistings over the program's history, may be perceived as reflecting negatively on the ESA.

Listed species that are reported to be possibly extinct as of the 2002 Report to Congress include:

1. Alani (*Melicope balloui*). According to the recovery plan, "[s]pecies is rare and known from only 9 collections, the last occurring in 1927…" and there is "…little accurate information regarding size and distribution of population."[105]

2. Alani (*Melicope quadrangularis*). According to the recovery plan only 13 individuals of species known as of 1994.[106]

3. Bachman's warbler (=wood) (*Vermivora bachmanii*). According to the recovery plan it is "presumed near extinction--no known localities of regular occurrence in since early 1970's (Cuba)" [sic][107]

4. Black clubshell (*Pleurobema curtum*). According to the recovery plan "fresh dead" specimens were last found in 1989.[108]

5. Bridled white-eye (*Zosterops conspicillatus conspicillatus*). According to the recovery plan it was last observed June 1983.[109]

6. Eastern Puma (=cougar) (*Puma (=Felis) concolor couguar*). According to the recovery plan there have been no breeding cougar populations substantiated since the 1920's.[110]

7. Eskimo curlew (*Numenius borealis*).

8. Flat pigtoe (*Pleurobema marshalli*). According to the recovery plan none were found alive during 1987 and 1988 surveys.[111]

9. Fosberg's love grass (*Eragrostis fosbergii*). According to the recovery plan it was thought extinct until 6 individuals were rediscovered in 1991.[112]

10. Green blossom pearlymussel (*Epioblasma torulosa gubernaculums*).

11. Guam broadbill (*Myiagra freycineti*). (This species was delisted as extinct in 2004.)[113]

12. Haha (*Cyanea copelandii ssp. copelandii*). According to the recovery plan it was last collected 1957.[114]

13. Ha`iwale (*Cyrtandra crenata*). According to the recovery plan a "[p]opulation has not been observed since 1947, and there are no other known individuals."[115]

14. Holei (*Ochrosia kilaueaensis*). According to the recovery plan it was last collected in 1927 and the last sighting was in the1940s.[116]

15. Ivory-billed woodpecker (*Campephilus principalis*). This species has been recently rediscovered.

16. Kauai akialoa (honeycreeper) (*Hemignathus procerus*). According to the recovery plan the species was last seen and collected in late 1960s.[117]

17. Kauai o`o (honeyeater) (*Moho braccatus*). According to the recovery plan there have been no sightings or observed vocalizations since 1987.[118]

18. Large Kauai thrush (*Myadestes myadestinus*). According to the recovery plan the last sighting was in 1989.[119]

19. Liliwai (*Acaena exigua*). According to the recovery plan the species has not been found since 1957.[120]

20. Mariana mallard (*Anas oustaleti*). (This species was delisted as extinct in 2004.)[121]

21. Maui akepa (honeycreeper) (*Loxops coccineus ochraceus*). According to the recovery plan there has been no "reliably detectable population" since 1970.[122]

22. Molokai thrush (*Myadestes lanaiensis rutha*). According to the recovery plan the species was last seen in a "fleeting glimpse" in 1988.[123]

23. Molokai creeper (*Paroreomyza flammea*). According to the recovery plan there have been no sightings since 1963.[124]

24. Oahu creeper (*Paroreomyza maculate*). According to the recovery plan the last "well documented sighting" was in 1985.[125]

25. O`u (honeycreeper) (*Psittirostra psittacea*). According to the recovery plan the last confirmed sightings were in late 1970's.[126]

26. *Phyllostegia glabra var. lanaiensis*. According to the recovery plan the species was last collected in 1914.[127]

27. San Marcos gambusia (*Gambusia georgei*). According to the recovery plan the last specimen was found 1982.[128]

28. Scioto madtom (*Noturus trautmani*). According to the recovery plan the species is possibly extinct.[129]

29. Southern acornshell (*Epioblasma othcaloogensis*). According to the recovery plan the species has not been found in decades.[130]

30. Stirrupshell (*Quadrula stapes*). According to the recovery plan a fresh dead shell was last found in 1986.[131]

31. Tubercled blossom pearlymussel (*Epioblasma torulosa torulosa*).

32. Turgid blossom pearlymussel (*Epioblasma turgidula*).

33. Upland combshell (*Epioblasma metastriata*). According to the recovery plan no living populations confirmed recently.[132]

34. Yellow blossom pearlymussel (*Epioblasma florentina florentina*).

35. Little Mariana fruit bat (*Pteropus tokudae*). According to the recovery plan the last sighting was in 1968.[133]

Status of NMFS Species

Although the NMFS report only addresses a fraction of the species addressed by the FWS, the reported numbers and status of species in the narrative do not agree with the data in the report's table.[134] Figures 5 and 6 indicate the different information provided in the NMFS narrative and table. In the table "species protected by NOAA Fisheries [NMFS] under the Endangered Species Act," proposed and candidate species and salmon of the Baker River that are of 'unknown' status and for which a 'not warranted' for listing determination was made are included.

The NMFS does not provide a measure addressing recovery achieved and reports the status of several species as "mixed." The mixed status regards, for example, species of fish that have different trends in different rivers. The mixed species include: the shortnose sturgeon, chum salmon (Columbia River), coho salmon (Southern OR, Northern CA coast), steelhead trout (Snake River) and chinook salmon (Puget Sound). NMFS reports that recent trends in the natural abundance of steelhead trout (Snake River) and chinook salmon (Puget Sound) are respectively, "mixed" and "variable," and states that "[t]he status of many shortnose sturgeon populations remains unclear." The shortnose sturgeon is reported to be increasing in numbers in rivers such as the Hudson and Delaware. However, the species has reportedly had less success in other rivers with the recent sighting of the species in the Florida's St. Johns River being the first since the 1970s. The NMFS does provide more detailed descriptions of its activities for the species covered by the report. For example with regard to the Atlantic population of green sea turtles the report indicates "all priority #1 tasks have been implemented." However, no information to put this information in context is provided. Overall, the report provides a somewhat blurry picture of the program.

Figure 5

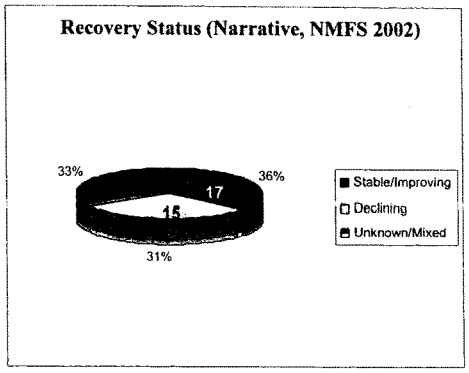
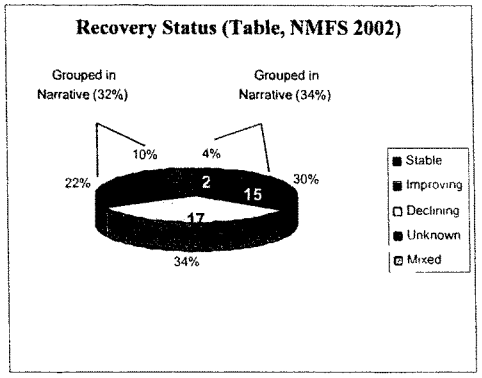


Figure 6



Relative Pace of Listing and Delistings and Program Sustainability

1982 amendments to the ESA and an accompanying conference report required that the "...priority [listing review] system address delistings as well."[135] Along the same line, the ESA provides that the Secretary may find a petitioned action is warranted but precluded (e.g. a species may merit listing but more important considerations can alleviate the obligation to do so) but a prerequisite for invoking the provision is that, "expeditious progress is being made .... to remove from such lists species for which the protections of the Act are no longer necessary."[136] These provisions recognize a need to address the removal of recovered, extinct, and erroneously listed species from the list. Just a few examples of the species that may merit delisting on basis of recovery or erroneous data include the gray wolf, bald eagle, Wright fishhook cactus, Uinta Basin

hookless cactus, island night lizard, Hawaiian hawk and American burying beetle. There are almost as many listed domestic species that are 'possibly extinct' as the total number of domestic species that have been delisted for all reasons (recovery, extinction or erroneous data). There has been limited progress in removing erroneously listed, extinct and perhaps even recovered species.

The fact that delistings have not kept pace with listings is to be expected for several reasons. For example, there were a significant number of species incorporated onto the endangered species list when the ESA was first enacted. These species were inherited from a preceding program. Additionally, the process of listing species is one that can be completed in a much shorter timeframe than the amount of time that is required for conservation activities to produce results. Numerous different factors may affect the time required for conservation activities to yield measurable results. For example, it can take many years for a species to reach sexual maturity and contribute to the population. Or, habitat manipulation may require years to conduct. When delisting species that are possibly extinct the FWS must take into account the possibility of rediscovery. Further, the listing process is in large part driven by litigation that is overwhelmingly focused on listing species and designating critical habitat. **The FWS notes in its most recent budget justification that its "litigation workload" with regard to listing includes "34 active lawsuits with respect to 48 species; 40 court orders involving 88 species; and 36 notices of intent to sue involving 104 species."**[137] (See Appendix 2 for a listing of these cases). Also, historically, the FWS has asserted a need for flexibility in prioritizing listing and delisting decisions that in some cases may favor listing actions over delisting actions.[138]

Although the pace at which listings and delistings occur is predictably different, several facts reveal that without improvements to the program, the number of listed species is likely to continue to swell:

- there has been a relatively small number of delistings (33 domestic delistings);
- the number of currently listed domestic species approaches 1,300;
- there have been few reclassifications from endangered to threatened, 77 percent of listed species are ranked at the bottom of recovery objectives achieved scale (0-25 percent) and some 60 percent are either categorized as of uncertain or declining status;[139]
- the FWS recognizes 283 candidates for listing;[140]
- there are over 6,000 species ranked as G1 ("critically imperiled") and G2 ("imperiled") on natural heritage databases some of which are likely to be petitioned and/or listed.[141]

When these facts are considered in the context of the regulatory consequences of adding species to the list, federal and state expenditures on endangered species, economic consequences of critical habitat designations and other regulatory consequences such as

the need for consultations on federal actions that may affect endangered species -- it becomes apparent that, in its current form, the endangered species program is likely not sustainable.

For example, according to the FWS, the bottom of the range of average costs for a proposed listing rule, final listing rule, proposed critical habitat rule, final critical habitat rule, and accompanying economic analysis and NEPA assessment are $75,000, $50,000 $180,000, $72,000, $150,000 and $25,000 respectively. [142] (See Appendix 3 for FWS data on these costs.) This yields a lower bound average of $552,000 in costs for adding a species to the list and designating its critical habitat. **Just listing and designating (the beginning of the ESA program) the current 283 candidates at this average cost would result in a total cost of over $150,000,000.**

Obviously the above is a simplistic assessment for several reasons. For example, these species would not all be listed simultaneously but over time. Some of the current candidates may not be listed as is evidenced by the some 70 animals and plants that have been removed from the candidate list since 1997.[143] Further, critical habitat may be determined jointly for some species. However, on the other hand, there are likely many species that have not been identified as candidates that will be considered for listing. Additionally, this assessment does not consider the costs of making 90-day and 12-month findings in response to petitions (the FWS estimates the lower bound of average costs for these actions to be $15,000 and $45,000 respectively). And, this assessment relies on the bottom of average cost range estimates. The 12-month finding for the sage grouse was estimated at $625,000 and FWS upper bound average cost estimate for proposed critical habitat is $925,000, as opposed to the lower-bound estimate of $180,000.

Further, such an assessment does not include the costs of proposed and final rules for delisting on the back end of the program and any costs associated with mandatory monitoring after a species is removed from the list. Likewise, any costs associated with possible reclassifications or costs associated with litigation support associated with challenges to these actions are not included. Just taking the low end of the average cost of proposed delisting rules (FY 05 $75,000)[144] and multiplying that by only half the currently domestically listed species (632) yields an estimate of over $47 million FY 05 dollars. Again, this is for just an unchallenged proposed rule for half of the listed domestic species. This calculation does not address costs associated with responses to petitions, final rules or legal challenges. There are also an additional 562 foreign species to consider.[145] Unlike the calculations involving candidates that might not be listed, eventually, all these listed species should be delisted as either recovered, extinct or, when new information becomes available, on the basis that the original listing data was erroneous.

While the process of delisting species does require an expenditure of some funds for proposed and final rules, retaining species on the list that do not merit listing is not without cost, as is later addressed. Delisting species that do not merit listing should assist in focusing resources more effectively and improve the program's credibility.

Potentially Unrecoverable Species

The purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species...."[146] The ESA defines "conserve" to mean "...to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which measures provided pursuant to this Act are no longer necessary."[147] As the FWS has recognized, the ultimate goal of the ESA "... is the recovery of endangered and threatened species..."[148] However, according to the FWS, "[s]ome critically endangered species may not respond due to limiting factors such as small population size that has limited or suppressed reproduction. Herculean efforts may be needed before an increase in population may be seen. ***It may even be that preventing extinction is the best that can be done with the current scientific information***, although the future may bring advances enabling the population to improve."[149] (emphasis added) While the ESA does not appear to contemplate cases in which species may be listed in perpetuity, several recovery plans reveal this possibility.

The goal of the recovery plan for three subspecies of beach mice found along the gulf coast of Florida and Alabama, the Choctawhatchee beach mouse (*Peromyscus polionotus ammobates*), the Perdido Key beach mouse (*Peromyscus polionotus trissyllepsis*) and Alabama beach mouse (*Peromyscus polionotus allophrys*) is downlisting. The plan states, "...due to the extensive and permanent loss of habitat for these beach mice, it will probably never be possible to safely remove them entirely from protection of the Act."[150] Similarly, the recovery plan for the cracking pearly mussel (*Hemistena lata*) states that, "[b]ecause of the lack of available habitat for establishment of all needed populations, recovery is unlikely."[151] Likewise, the plan for the ring pink mussel (*Obovaria retusa*) states "[t]otal recovery is not thought possible."[152]

These are not the only examples of a low recovery potential. As previously addressed, FWS reports that the recovery potential for 40 percent of listed species is low. A number of recovery plans indicate a low recovery potential having something short of delisting such as downlisting as the plan or interim plan's goal or otherwise state that the potential for recovering the species to the point at which it may be delisted is questionable. These include, for example:

- The goal of the recovery plans for Louisiana pearlshell mussel (*Margaritifera hembeli*),[153] Mariana common moorhen (*Gallinula chloropsus guami*)[154] and Mariana fruit bat (*Pteropus mariannus mariannus*)[155] is downlisting.

- According to the recovery plan for the cave crayfish (*Cambarus zophonastes*), "[d]ue to the apparent limited potential for discovering new populations, the delisting objective may never be attainable."[156]

- The flattened musk turtle's (*Sternotherus depressus*) recovery plan states, "[a]ll that can reasonably be stated now relative to the time required for recovery is that, under the best of circumstances, it will take more than three decades."[157]

- The American crocodile (*Crocodylus acutus*) recovery plan states, "[d]ue to the nature and the extent of the threats to the crocodile, complete delisting may never be possible" and that reclassification to threatened is the "long term objective."[158]

- The recovery plan for the Florida scrub jay (*Aphelocoma coerulescens coerulescens*) states, "**[b]ecause of the extreme usefulness of the Act in this case, it is not desirable to remove the scrub jay from protection under the Endangered Species Act.**"[159] (emphasis added)

- "Protection of existing populations" is the goal of the Hualapai Mexican vole (*Microtus mexicanus hualpaiensis*) recovery plan.[160]

- The Loach minnow (*Tiaroga cobitis*) recovery plan calls for, "[p]rotection of existing population. Eventual delisting, if possible."[161]

- The goal of the Mount Graham red squirrel (*Tamiasciurus hudsonicus grahamensis*) recovery plan is to "[s]tabilize" the species.[162]

- According to the recovery plan for the San Bruno elfin (*Callophrys mossii bayensis*) and Mission blue butterfly (*Icaricia icarioides missioensis*), "[t]he primary object of the Recovery Plan… is to maintain and enhance existing populations…"[163]

- The spikedace (*Meda fulgida*) recovery plan calls for, "[p]rotection of the existing population. Eventual delisting, if possible."[164]

- The recovery plan for the St. Thomas prickly-ash (*Zanthoxylum thomasianum*) calls for, "[g]uidance for reversing decline… and restoring… stable, secure, and self sustaining status, thereby permitting… reclassified… and perhaps eventually allowing its removal."[165]

- The recovery plan for the Tar River spinymussel (*Elliptia steinstansana*) states, "[t]hough the ultimate goal is to recover the species to the point where it can be removed from the Federal List of Threatened and Endangered Wildlife and Plants, full recovery of the Tar River spinymussel may not be possible."[166]

- The recovery plan for the white cat's paw pearly mussel (*Epioblasma sulcata delicata = obliquata perobliqua*) states, "… protect only extant population… With such a low population level and restricted distribution, recovery to the point where the species no longer requires protection under the Act is unlikely."[167]

White Cat's paw pearly mussel

Of the above, only the crocodile is considered improving and having met 50 percent or more of the recovery objectives. Consequently, the FWS has recently announced that it

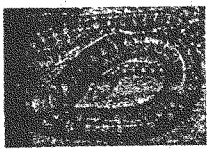
will propose downlisting the crocodile from endangered to threatened in the United States, which is at the limit of the species' range. Prospects for the Mariana fruit bat improved when it was determined that the bat had a larger range than originally believed and it was subsequently reclassified as threatened. Four of the above species are considered stable and to have met only 0 to 25 percent of the recovery objectives. The rest are declining or uncertain and fall somewhere in the 0 to 50 percent recovery achieved range.

In cases, the recovery challenges faced by a species may be an uphill battle against nature itself. For example, **several recovery plans indicate that some listed species are possibly relictual species ('relics') from earlier geological eras. For example:**

- The plan for the Desert Slender Salamander (*Batrachoseps aridus*) states, "[a]pparently it is a relictual species that had a wider distribution during wetter geological epochs."[168]

- The Iowa Pleistocene Snail (*Discus macclintocki*) recovery plan states, "[t]he plan … is intended to provide decision makers with a possible set of procedures which if implemented will result in changing the status of the Iowa Pleistocene snail minimally from endangered to threatened, and feasibly to delisted." "Thus the major long-term cause of decline is cyclic climatic change. The species has survived several such cycles in the past, however. With a return to glacial conditions it will be resuscitated over the major part of the upper Midwest, provided its relictual areas are preserved and maintained."[169]

- The recovery plan goal for the Virgin Islands tree boa (*Epicrates monensis granti*) is "[d]ownlisting" and the plan states, "[t]he species' absence from Puerto Rico is best explained by widespread extinctions of xeric-adapted herptefauna on Puerto Rico during the Pleistocene."[170]


Virgin Islands tree boa

- According to the Wyoming toad's (*Bufo hemiophrys baxteri*) recovery plan the goal is "[d]ownlisting" and it states, "[t]he Wyoming toad is a glacial relic known only from Albany County, Wyoming."[171]

Wyoming toad

- The Santa Cruz long-toed salamander (*Ambystoma macrodactylum croceum*) recovery plan goal is "[d]ownlisting" and the plan states, "[t]he SCLTS is a relict form of a species that was probably widespread throughout much of California during and immediately after the last Pleistocene ice advance, 10,000 to 20,000 years ago…"[172]

Despite information in aforementioned recovery plans that would seem to indicate a low recovery potential, 18 of 26 or almost 70 percent of these species have recovery priorities for species with a high recovery potential. This would seem to indicate that the data in the recovery plans was erroneous or the assessed recovery priorities are not accurate.

VII. Species Expenditures

Another report required under the ESA is Section 18's Species by Species Expenditure Report that is to be produced annually by FWS. These reports list the expenditures reasonably attributable to a specific species by federal agencies and by 'the states' collectively. The expenditure data include a separate accounting of expenditures on land acquisition related to specific species.

Tables 2, 3 and 4 provide expenditure data from the FWS FY 04 expenditure report. Table 2 shows the ten listings that the FWS ranked as receiving the most funds. Most of the top ten listings are fish and most of these are from the Pacific Northwest and regulated by NMFS.

In its expenditure report the FWS provides an alternative accounting of the ten "species" receiving the most funds. In this table the FWS combines listed subspecies, DPS's or evolutionary significant units that belong to the same species. This accounting reflects groupings of the same biological species that NMFS may manage separately, for example, as different evolutionarily significant units based on different spawning runs. However, it is on the basis of such differences that these species have been segregated into individually regulated subunits. The division of these fish into units endemic to a river or separated from one another based by the timing of the spawning runs can result in relatively heightened assessments of threats and have an effect on consultation and other ESA activities. This alternative top ten (as combined by the FWS) is provided in Table 3. Again most are fish with most from the Pacific Northwest and regulated by NMFS.

Table 4 presents the FWS FY 2002 expenditure data for all of the species with the highest recovery priority ranking, '1C' in the FY 01-02 Report to Congress. There are 12 such species. With the exception of the green sea turtle, the reported expenditures for these species are well below the reported expenditures for the top ten earners as reported in both Table 2 and 3. Some rank relatively low with the swamp pink, a plant, and the Comal Springs dryopid beetle ranking 603 and 726 respectively among the species covered by the report. Only 0-25 percent of the recovery objectives have been met for all 12 of the species ranked 1C. Of the twelve 1C species, six are of declining status, two are of uncertain status while three are stable and one is improving.

The GAO recently found that the FWS directs its funds to species with higher priorities but GAO notes that it made no assessment of the priority system.[173] As already addressed, the assignment of priorities is heavily skewed toward the high priority end of the scale. Consequently, even if expenditures were randomly distributed, a majority should fall in the upper third of the priority rankings. The GAO also found that, based on

a weighted average of expenditures on federally endangered and threatened animals and plants, subspecies got more than twice the funding of species despite the fact that subspecies are ranked below species as regards genetic distinctiveness. Monotypic species did receive the most funding on the weighted average basis.

Again, using the Report to Congress for FY 01-02 and the FWS FY 02 expenditure report, at the very top of the priority scale are some 121 recovery priority '1C,' '1,' and '2C' species. Using the term 'species' in its biological and not legal context, this pool includes all the highest priority monotypic species and the highest priority full species that are in conflict. This group represents roughly 10 percent of the 1,254 species covered in the most recent FWS Report to Congress and the upper-half of possible priorities among the highest threat and recovery potential FWS species. About 84 percent fall in the 0-25 percent recovery achieved class. About 50 percent are declining and 19 percent are of uncertain status. About one third of these species have been listed more than two decades, a number being listed before the ESA of 1973. 40 percent of these highest priority species fall below the median expenditure for those species with reported expenditures in FY 02. Several of these species had no reported expenditures. (It should be noted that the expenditure rankings include the NMFS species for which recovery priorities are not reported. Additionally, aggregate expenditures were provided in the Species by Species Expenditure report for the green, hawksbill and leatherback sea turtles rather than expenditures attributable to the individual listings).

Table 2: "Entities" with the largest reported expenditures in FY 2003

Top 10 listed species	Status	Agency	Priority*	Taxonomic Unit	Population Status**	Recovery Achieved***	$ Rank****	Expenditures ($K)	Expenditures ($K) including land	% Non-FWS/NMFS expenditures (including land)
Steller sea-lion (Western)	E	NMFS	Not Reported	DPS	Declining	Not Reported	1	49,514	49,514	84%
chinook salmon (Spring/Summer Snake R)	T	NMFS	Not Reported	ESU	Improving	Not Reported	2	35,577	36,012	60%
bull trout (US lower 48)	T	FWS	9c	Subspecies	Stable	0-25%	3	29,296	29,914	77%
steelhead (Snake R. Basin)	T	NMFS	Not Reported	ESU	---	Not Reported	4	23,859	24,067	59%
steelhead (Middle Columbia R)	T	NMFS	Not Reported	ESU	Improving	Not Reported	5	20,468	21,573	80%
chinook salmon (Fall Snake R)	T	NMFS	Not Reported	ESU	Improving	Not Reported	6	18,781	19,332	73%
chinook salmon (Puget Sound)	T	NMFS	Not Reported	ESU	---	Not Reported	7	15,560	16,277	68%
coho salmon (OR, CA pop.)	T	NMFS	Not Reported	ESU	---	Not Reported	8	14,925	14,925	66%
right whale	E	NMFS	Not Reported	Species	Declining	Not Reported	9	11,802	11,802	13%
Rio Grande silvery minnow	E	FWS	2c	Species	Declining	0-25%	10	11,301	11,301	93%

*NMFS did not include a priority ranking in their report.
**Single status for multiple listed species.
***NMFS does not report recovery objective achieved.
****Rank does not take land expenditures into account.

Table 3: "Species" with the largest reported expenditures in FY 2003

Top 10 "species"	Status	Agency	Priority*	Taxonomic Unit	Population Status	Recovery Achieved**	$ Rank***	Expenditures ($K)	Expenditures ($K) including land	% Non-FWS/NMFS including land expenditures
chinook salmon (9)****	E,T	NMFS	Not Reported	Species	Mixed	Not Reported	1	122,620	126,482	59%
steelhead (10)****	E,T	NMFS	Not Reported	Species	Mixed	Not Reported	2	101,449	105,895	61%
Steller sea-lion (2)****	E,T	NMFS	Not Reported	Species	Mixed	Not Reported	3	54,811	54,811	78%
coho salmon (3)****	T	NMFS	Not Reported	Species	Mixed	Not Reported	4	30,242	30,669	57%
bull trout	T	FWS	9c	Subspecies	Stable	0-25%	5	29,296	29,914	77%
sockeye salmon (2)****	E,T	NMFS	Not Reported	Species	Mixed	Not Reported	6	16,005	16,011	49%
chum salmon (2)****	T	NMFS	Not Reported	Species	Mixed	Not Reported	7	13,369	13,713	36%
right whale	E	NMFS	Not Reported	Species	Declining	Not Reported	8	11,802	11,802	13%
Rio Grande silvery minnow	E	FWS	2c	Species	Declining	0-25%	9	11,301	11,301	93%
red-cockaded woodpecker	E	FWS	8c	Species	Improving	0-25%	10	11,068	12,390	85%

*NMFS did not include a priority ranking in their report.
**NMFS does not report recovery objective achieved.
***Rank does not take land expenditures into account.
****all subspecies, ESUs, or DPSs combined.

Table 4: FWS Priority "1C" species expenditures and ranking in FY 2003

Species	Status	Agency	Population Status	Recovery Achieved	$ Rank*	Expenditures ($K)	Expenditures ($K) including land	% Non-FWS/NMFS including land expenditures
hawksbill sea turtle (Atlantic populations)**	E	FWS/NMFS	D	0-25%	56	3,309	3,403	44%
hawksbill sea turtle (U.S. Pacific populations)**	E	FWS/NMFS	D	0-25%	see above	see above	see above	see above
green sea turtle (U.S. East Pacific populations on the west coasts of the U.S., Central America and Mexico)***	E	FWS/NMFS	D	0-25%	70	2,048	2,048	6%
green sea turtle (U.S. Atlantic populations and individuals foraging in U.S. territorial waters)***	E	FWS/NMFS	I	0-25%	see above	see above	see above	see above
green sea turtle (U.S. Pacific populations in Hawaii, Guam, Northern Mariana Islands, American Samoa and other unincorporated U.S. Pacific islands/atolls)	T	FWS/NMFS	D	0-25%	58	3,259	12,253	12%
slender-horned spineflower	E	FWS	D	0-25%	274	99	99	100%
Comal Springs dryopid beetle	E	FWS	D	0-25%	726	11	11	9%
swamp pink	T	FWS	S	0-25%	603	20	20	85%
Kauai cave wolf spider or pe'e pe'e maka 'ole	E	FWS	S	0-25%	312	81	81	0%
Kauai cave amphipod	E	FWS	S	0-25%	307	83	83	0%
razorback sucker	E	FWS	U	0-25%	27	7,127	7,319	93%
Sacramento splittail	T	FWS	U	0-25%	181	236	236	91%

*Rank does not take land expenditures into account.

**FY 03 report does not differentiate between the 2 hawksbill populations.

***FY 03 report does not differentiate between different endangered populations of the green sea turtle.

Figure 7

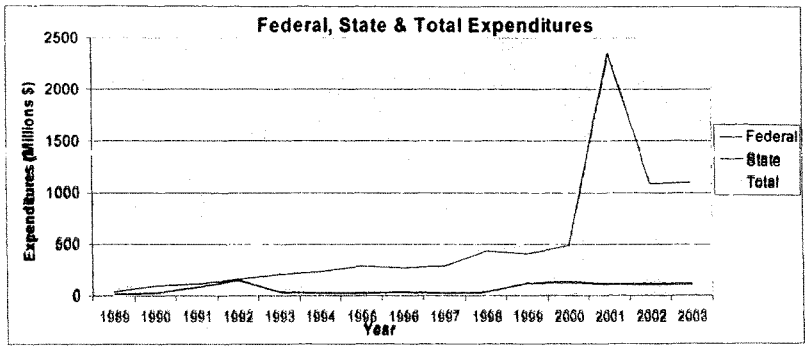
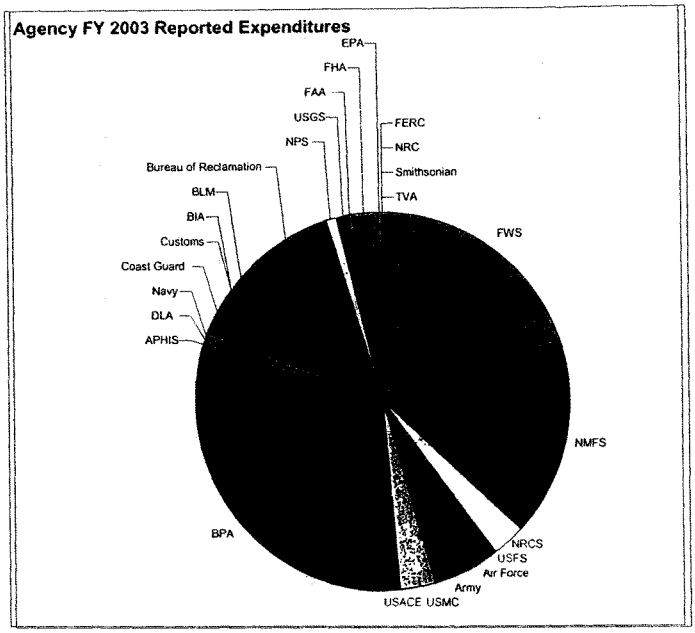


Table 5

Agency FY 2003	total ($k)
APHIS	6,511
USFS	18,156
NRCS	31,728
NMFS	187,644
Air Force	11,279
Army	30,275
DLA	158
USMC	4,528
Navy	4,220
USACE	32,136
BPA	345,766
Coast Guard	47,732
Customs	300
BIA	2,478
BLM	25,972
Bureau of Reclamation	83,839
NPS	10,347
USGS	12,476
FAA	516
FHA	26,171
EPA	2,669
FERC	298
NRC	102
Smithsonian	471
TVA	32
FWS	221,589

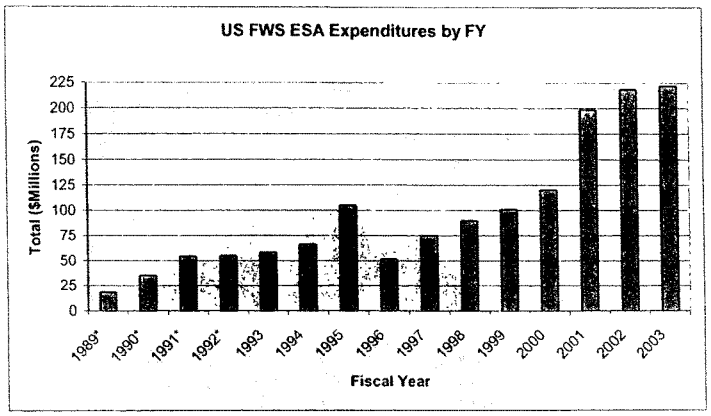
Figure 8



FWS and NMFS Reported Expenditures

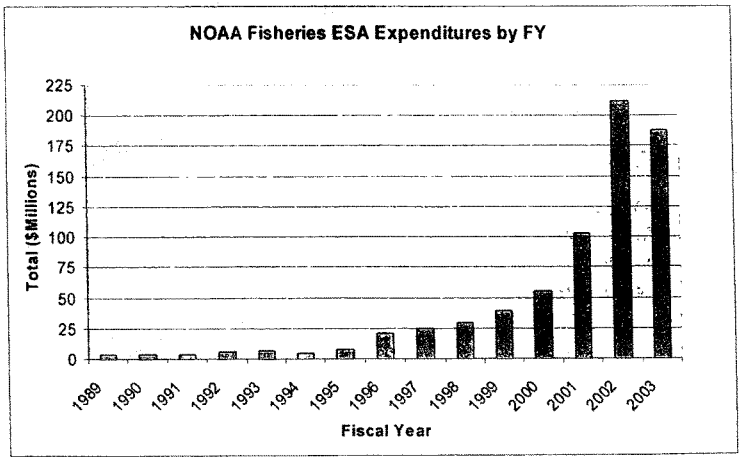
The FWS makes clear that inferring trends from data provided in the expenditure reports is difficult at best. As agencies have become accustom to the expenditure data collection process, reporting has likely improved. Further, the methodology in preparing the reports has changed over time. For example, in earlier years expenditures on land purchases were not segregated.

Figure 9



*After 1993, land acquisitions were compiled separately, but have been combined here.

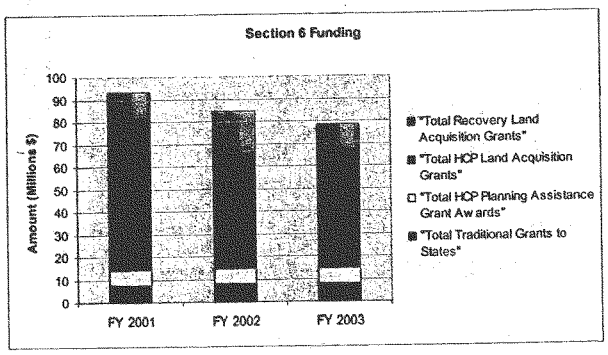
Figure 10



Section 6 Expenditures

There has been increasing discussion on the role of states under the ESA. Section 6 makes provision for cooperation with the states and a means of providing funding. Figure 11 portrays recent Section 6 expenditures and reveals a majority of Section 6 funds in recent years have been directed to land acquisition. (See Appendix 4 for FWS data on Section 6).

Figure 11

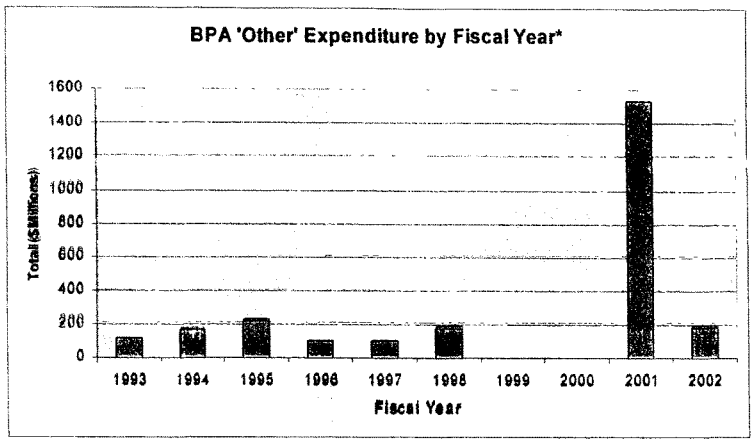


Expenditures by the Bonneville Power Administration and other Federal Agencies

The Bonneville Power Administration (BPA) reports particularly large expenses that are attributable to lost power generation revenue and additional purchases of power. The revenue is recorded as lost when water is spilled for the purpose of conserving listed species rather than to generate electricity. Additionally, the BPA reported large additional costs as it needed to purchase power when it was not generating enough to meet its obligations. These costs were particularly large **during the West Coast energy crisis of FY 01 when BPA reported species expenditures approaching $1,700,000,000.**[174]

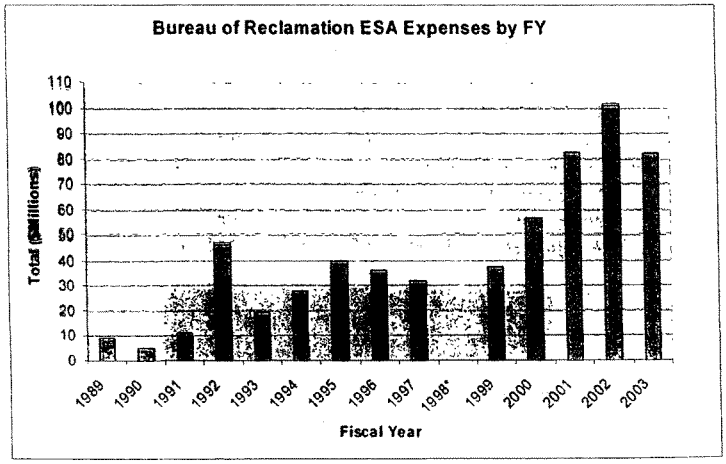
Chinook salmon

Figure 12



*Numbers correspond to 'other' BPA expenditures on ESA such as forgone power revenue, which represent the great majority of ESA expenditures by BPA. No other ESA expenditures were reported in 1999 or 2000. Total reported ESA expenditures in 2001 approached $1.7 billion.

Figure 13



*The 1998 report found on FWS website provides incomplete data from Bureau of Reclamation.

Figure 14

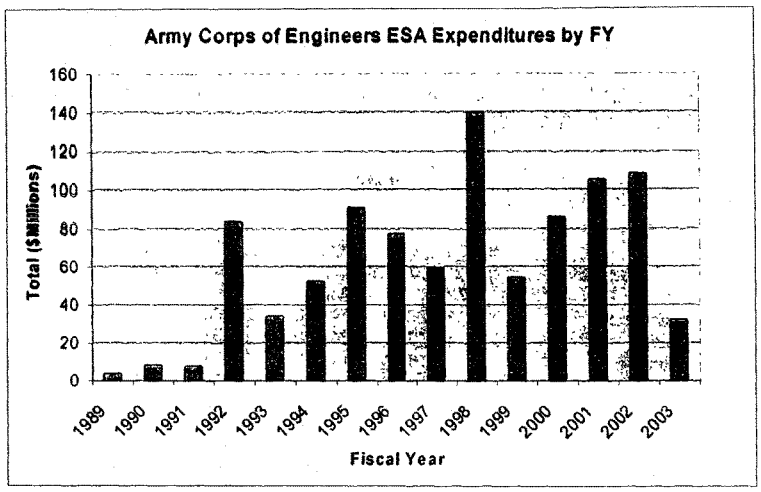
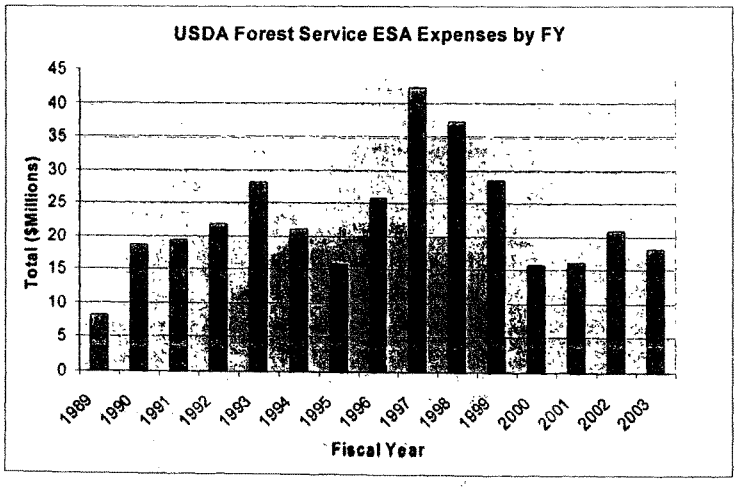


Figure 15



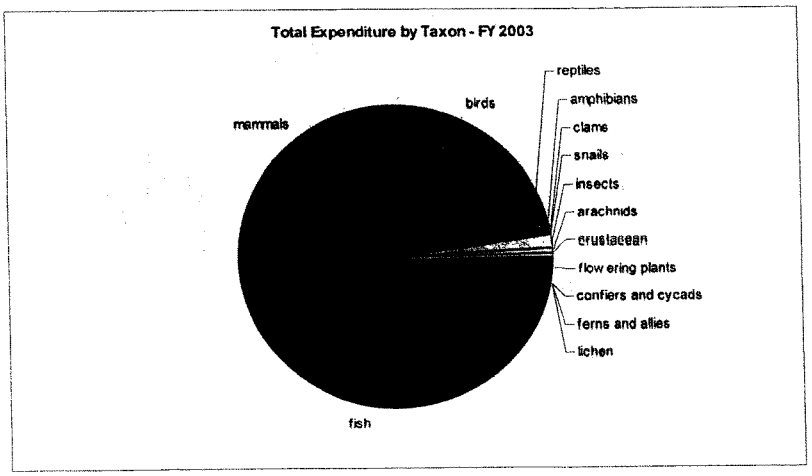
Expenditures by Taxon

In the most recent expenditure reports, fish, as a taxon, received the greatest percentage of funds. The increase in expenditures on fish is in large part attributable to expenditures related to salmon and steelhead in the Pacific Northwest. Substantial expenditures on fish have been made by the BPA, NMFS, Bureau of Reclamation, the Corps of Engineers and the FWS.

Table 6

Taxon – 2003	non –land expenditures ($k)	land purchase ($k)	total ($k)	rank
mammals	133,849	34,850	168,699	2
birds	90,767	24,690	115,457	3
reptiles	38,168	10,613	48,781	4
amphibians	5,761	815	6,576	7
fish	382,364	15,414	397,778	1
clams	4,934	0	4,934	8
snails	2,086	2,192	4,278	9
insects	4,582	4,869	9,451	6
arachnids	563	0	563	11
crustacean	1,209	2,090	3,299	10
flowering plants	19,944	5,227	25,171	5
conifers and cycads	19	0	19	14
ferns and allies	562	0	562	12
lichen	22	0	22	13

Figure 16



Following 1979 Amendments to the ESA, the FWS adopted a system to prioritize consideration of species which are considered to be "higher life forms." This system ranked species in a descending order: mammals, birds, fish, reptiles, amphibians, vascular plants and invertebrates.[175] However, according to the FWS, it altered its policies so as to give no priority to higher or lower life forms in response to a conference report accompanying 1982 ESA amendments that "stated opposition" to a system that gave priority to "higher or lower life forms."[176]

Within that statute itself various provisions appear to head in different directions on the issue of according preference to different taxons. The inclusion of a species on the endangered species list as a distinct population segment is limited to vertebrates, and while prohibitions regarding take of animals do not, take prohibitions apply differently to plants dependant upon property ownership. However, the ESA directs that the Secretary develop and implement recovery plans "without regard to taxonomic classification".[177]

Expenditure reports do generally indicate larger expenditures going to relatively 'higher taxa.' There are likely many factors that contribute to this. A significant portion of this is driven by conflict with fish. Some is clearly directed at what are often called 'flagship species' or 'charismatic megafauna' - essentially popular species. Some expenditures are earmarked for certain species by Congress. Recent expenditure reports do reveal expenditures directed to species that were likely not driven on the basis of popularity as examples in Table 7 show.[178]

Table 7

Examples of expenditures on 'non charismatic' species

Species (by common name & number)	FY'03 ($k-rounded)
bats (9)	7,237
crows (2)	1,103
mice (9)	6,751
rabbits (3)	1,016
rats (9)	855
snails (23)	6,361
spiders (8)	328
squirrels (6)	1,109

Tooth Cave spider

Expenditures on Species Listed Based on Erroneous Data

Delistings, downlisting and information in previous Reports to Congress and recovery plans reveal that data used in listing a number of species has subsequently been determined to be erroneous. Populations of and the distribution of listed species have been underestimated. Threats to species have been overestimated and taxonomic classifications of some species have been subsequently revised. In part, this may be attributed to the current application of the ESA's standard of "best scientific and commercial data available." Currently, there is little or minimal requirement as to the qualitative or quantitative nature of information needed to make a determination under the ESA. The Data Quality Act appears to prescribe more rigorous standards for data used in a rule-making.

An inherent problem in making determinations as to the threat faced by species is that relevant data are often quite limited. A species may cover a large area, have a life history that makes the collection of information difficult (such as living in a cave or on the river bottom) or be difficult to distinguish from other species except to those with a particular expertise. Increasing use of genetic analysis can reveal that two species, once believed distinct from one another based on morphology or geographic differences, are genetically similar. Conversely, a species that was an amalgamation of similar animals or plants 'lumped' together may warrant further taxonomic divisions. While uncertainty and change are to be expected in biological science, they can have consequences under the regulatory framework of the ESA.

The FWS has recognized that listed species which do not actually merit listing, can divert scarce conservation dollars from truly endangered species. With regard to its species priority management system, the FWS states, "the first consideration of the system accounts for the management burden entailed by the species' being listed, which, if the current listing is no longer accurate, could divert resources from species more deserving of conservation efforts."[179] Table 8 reveals expenditures on species that were delisted or are proposed for delisting based upon erroneous data and a few examples of other listed species that may merit delisting on similar grounds. The costs indicated in this table reflect reported expenditures by federal and state agencies. However, these figures do not reflect all the expenditures that can result from erroneous listings.

For example, the figures for the Preble's meadow jumping mouse likely miss significant costs borne by state government and do not account for costs imposed upon lesser governmental entities and private parties. The critical habitat designation for this mouse reveals the types of costs that can occur. Over 31,000 acres of critical habitat was designated for the Preble's meadow jumping mouse.[180] FWS economic impact assessment for the critical habitat designation anticipated costs of $74 -$172 million. An addendum to this analysis increased the estimate to $79 – $183 million over ten years.[181]

Preble's meadow jumping mou

Another indicator of costs related to the Preble's mouse are the effort going into habitat conservation plans. So that activities that would be considered to possibly otherwise violate the ESA can continue, a number of parties invested resources to prepare habitat conservation plans. Having an approved plan would allow the parties to receive protection from a charge of violating the ESA. To date some 16 Preble's meadow jumping mouse habitat conservation plans covering some 9,680 acres have been established ranging from just over a half acre to 6,143 acres.[182]

The Executive Director of Colorado's Department of Natural Resources has identified about $10 million in state funding directed at Preble's meadow jumping mouse research and conservation and over 25 million in grants directed to land preservation projects that have a total budget over $250 million. All of the projects were described as benefiting Preble's meadow jumping mouse habitat or potential habitat.[183]

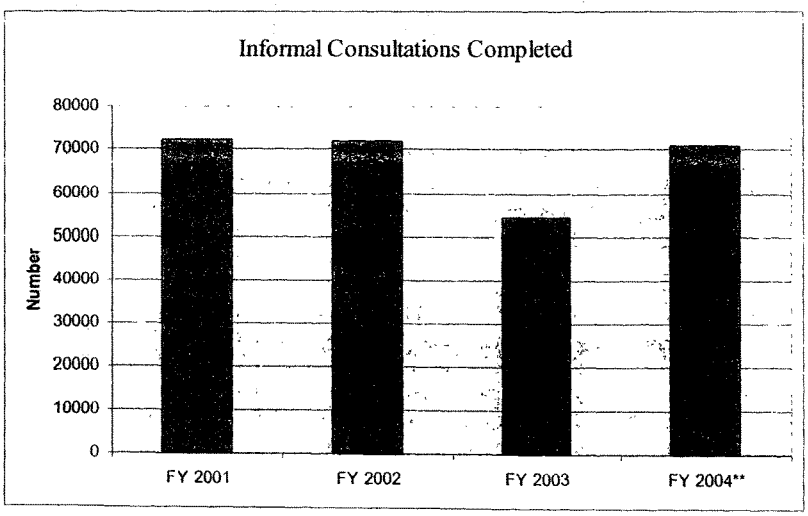
There can be other conservation costs associated with species that are listed on the basis of erroneous data (costs that are also applicable to species that are not data errors). With regard to the effects of the Preble's listing, researchers reporting in the journal Conservation Biology found that "[l]isting the Preble's under the ESA does not appear to have enhanced its survival prospects on private lands. In terms of hectares owned, for example, the efforts of landowners who reported they had sought to help Preble's (25 percent) were canceled out by the efforts of those who sought to harm it (26 percent). Moreover, the majority of respondents had not or would not allow a biological survey (56 percent), thus preventing collection of data for conserving the species."[184]

Table 8: Expenditures on species listed with erroneous data

SPECIES	DATE LISTED	DATE DELISTED	$ EXPENDITURES (ROUNDED THOUSANDS)																AGENCIES REPORTING EXPENDITURES
			1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	TOTAL	
DELISTED																			
barberry, Truckee	1979	2003	0	0	0	0	2	22	130	10	2	2	36	13	3	0	30		None
cactus, Lloyde's hedgehog	1979	1999	0	2	8	8	2	10	3	1	1	1	1						Air Force, Corps of Engineers
cactus, Spineless hedgehog	1979	1993	6	6	0	22	0												None
cuneate bidens	1984	1996	0	0	0	22	1	20	0	6									None
globeberry, Tumammoc	1986	1993	1,167	214	69	152	0												Bureau Reclamation, Corps of Engineers,
monarch, Tinian	1970	2004	0	0	7	2	6	82	105	15	31	30	25	32	25	25	16		Navy
shrew, dismal swamp southeastern	1986	2000	34	18	55	11	42	118	58	32	30	14	1	11					FHA, Soil Conservation Service, Corps of Engineers
trout, coastal cutthroat Umpqua R.	1996	2002	0	0	0	0	0	0	0	4,263	2,146	2,430	15	86	0	0			NRCS, EPA, APHIS, Corps of Engineers
wooly - star, Hoover's	1990	2003	0	15	15	65	88	112	136	477	99	45	56	21	10	8	11		BLM, USFS, Bureau of Reclamation, Corps of Engineers
PROPOSED DELISTING		**DATE PROPOSED**																	
frankenia, Johnston's	1984	2003	0	1	1	13	31	38	33	33	16	14	43	35	140	27	51		None
mouse, Preble's meadow jumping	1998	2005	0	0	0	0	0	0	0	0	0	1,174	1,059	2,370	762	1,051	873		USFS, NRCS, Air Force, Army, Corps of Engineers, USGS, FERC, BLM, FHA
sunflower, Eggert's	1997	2004	0	0	0	0	0	0	0	0	94	453	87	53	259	151	178		Corps of Engineers, NPS, FHA, FERC, Air force
LIKELY DATA ERRORS																			
cactus, Unita Basin hookless	1979	NA	9	14	17	31	38	10	13	20	12	18	10	32	35	43	31		BLM, NPS
cactus, Wright fishhook	1979	NA	14	5	1	12	10	14	16	26	21	14	12	21	35	41	76		BLM, Bureau of Reclamation, NPS
lizard, Island night	1977	NA	9	11	25	20	8	52	147	47	52	24	31	31	4	6	11		Navy, USGS

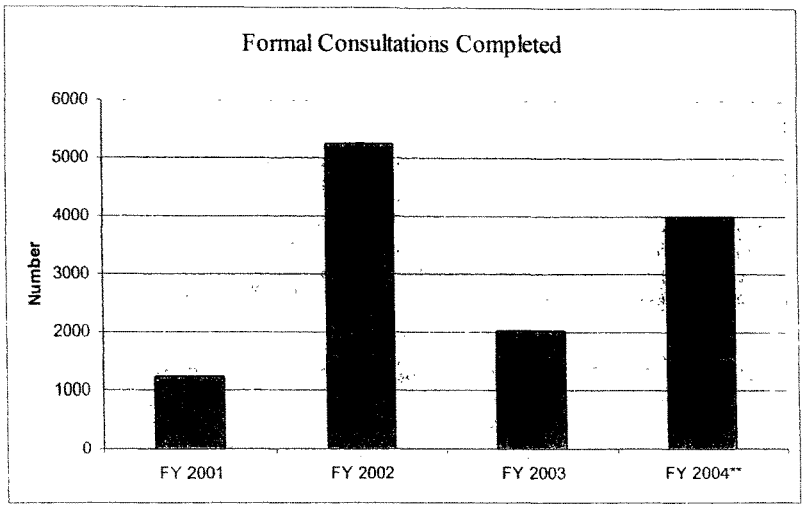
Another erroneously listed species, Eggert's sunflower, provides an additional example of such costs. In 2004 the FWS proposed delisting Eggert's sunflower after new information increased the population estimate from 34 known sites to 279 known sites. New life history information also showed that the species could thrive in disturbed areas and, consequently, actions such as timber harvesting and clearing could provide manmade habitat. In its delisting proposal, the FWS notes that it "evaluated potential impacts to this species from 248 federal actions..." and "conducted two formal consultations..."[185] The FWS also notes that it was sued by the Southern Appalachian Biodiversity Project for making the determination that designating critical habitat for Eggert's sunflower was not prudent. The expenditure of funds on species like Eggert's sunflower reduces funds available to address the already large workload generated under the ESA. Figures 17 and 18 (depicting the total formal and informal consultations for fiscal years 2001 – 2004) provide some sense of the workload to which these additional burdens are added. (See Appendix 5 for information on FWS ESA actions)

Figure 17



** FWS reported >71,000 informal consultations in FY 2004.

Figure 18



FWS reported > 4,000 formal consultations completed in FY2004

The sheer volume of material processed under the ESA Section 7 is an indicator of the amount of time federal biologists and resource professionals allocate to endangered species activities other than recovery. This is likely true of biologists and resource managers outside of FWS and NMFS in other Federal and state agencies as well as in the private sector.

For example, US Forest Service and Bureau of Land Management officials report that there is, "...a complex bureaucratic maze of process and procedures, which field biologists and managers must attempt to negotiate on a daily basis in order to implement on-the-ground projects."[186] Making the comments on well "intention[ed]" regulation, policies and directives, the agencies provide examples of what appear to be waste of agency resources and the non-navigable nature of the current endangered species program including:

- a roughly two year consultation so that the Lower Elwha Tribe could obtain "a cedar tree for a canoe for ceremonial purposes;"

- preparation of a 45 page biological assessment so that possibly several leaky toilets could be replaced at campgrounds and;

- the inability to obtain "a letter of concurrence" finding a wedding at a camping site was not likely to affect endangered species. The area requested for the wedding was the "same area as the (unpermitted) 2001 Rainbow Gathering (20,000 people), which

included many unauthorized activities (camping, latrines, kitchens) within the riparian area..."

Limits of Expenditure Report Data

Beginning with FY 01 the FWS has provided more comprehensive view of endangered species expenditures has been presented. Many expenditures such as some of those reported by Bonneville Power Administration were reflected in the totals. For the first time ESA expenditures that could not be attributed to a specific species were included in the 2001 report as "other ESA" expenditures. Although the ESA only requires reporting those expenditures "reasonably attributable" to a specific species, this commendable FWS initiative provides a more complete picture of endangered species expenditures.

While the 2001 and 2002 reports provide a more complete view of endangered species expenditures, they fall far short of capturing all expenditures on endangered species. **The current reporting still does not present a complete picture of federal or state ESA expenditures.**

For example, the Corps of Engineers recently testified that, "[b]ased on recent expenditure reports, the Corps has spent from $32 to over $108 million per year since 1996 on over 250 federally listed threatened species and endangered species. ... Reported expenditures are suspected to be a substantial underestimate of the true cost of ESA compliance. A recent investigation for sea turtles, for example, revealed that reported costs were only about half the actual costs incurred by Districts. We are now developing an improved cost accounting system."[187]

Perhaps similarly, while the US Forest Service reported some $18 million in FY 03 for species specific expenditures, it reported no "other ESA" expenditures. Given this agency's mission, it seems unlikely that there were not significant expenditures that would fall in the "other ESA" category. Endangered species conservation plays a powerful role in federal land management and may have a large effect on revenues derived from federal lands. For example, species conservation efforts may have led to lost royalties and reduced timber harvest revenues while increasing management costs. There is no indication that the USFS reported expenditures reflect lost revenues and the same may be said of the Bureau of Land Management expenditure data. Another example is that the Department of Justice (DOJ) reports no expenditures with regard to the ESA litigation expenditures. Similarly there were no reported costs associated with payments from the Judgment Fund for cases in which the plaintiffs' received attorney's fees resulting from ESA litigation.

State expenditures may also be significantly under reported. Currently, states report expenditures to an association which then reports them to the FWS. In the FWS report the expenditures by the states on each species have been aggregated. From the FWS report it cannot be determined how much any particular state reported or exactly what agencies within any given state have reported expenditures. Many state departments of transportation, for example, likely have sizable endangered species expenditures that

would be missed if a state simply reported expenditures by its department of natural resources or its fish and game agency.

More importantly, **the expenditure reports, consistent with the current provisions of the ESA, do not address expenditures by governmental units below the level of states, and the reports do not reflect private expenditures or costs.** These costs are likely a significant percent of the total expenditures the public makes on endangered species and range from funds expended by private preservation organizations for the conservation of habitat to costs absorbed by a county or business to achieve compliance.

Costs borne by the city of Colton, California related to the Delhi sands flower-loving fly are an example of economic impacts on governmental units below the state level. Colton reports over a dozen different conflicts with the fly including some $4 million for redesigning activities at the San Bernardino County Hospital, an over $80 million decrease in assessed valuation affecting tax roll revenues, an increase of $1.5 million in street maintenance costs, increased costs for a storm drainage project, delay of road realignment and loss of grants for an interchange project.[188]

Delhi sands flower-loving fly

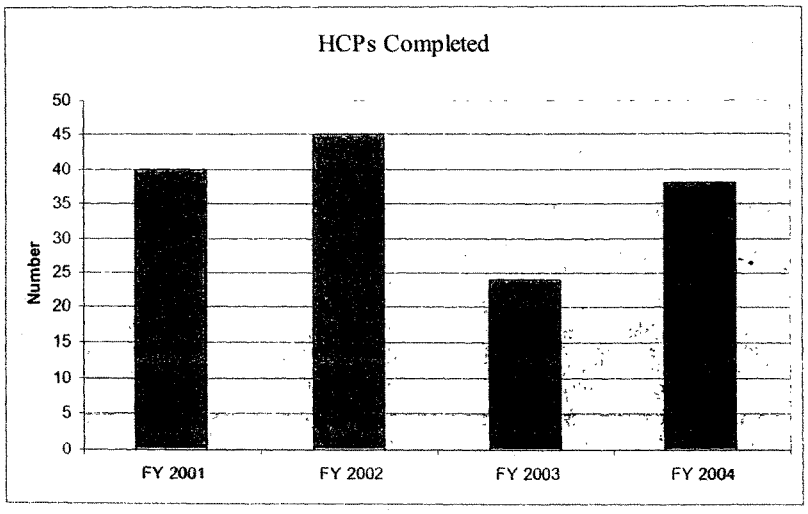
Additional indications of the kinds of costs born by private and other governmental entities on endangered species is revealed in the more recent economic analyses conducted in association with promulgation of critical habitat and in the funding of habitat conservation plans. For example, the FWS has estimated the cost of designating 95,655 acres of critical habitat for the Arroyo toad (*Bufo californicus*) at $1 billion over 10 years.[189] According to the FWS, "[t]he $1 billion estimate includes impacts of arroyo toad conservation activities on lands proposed for designation. The real estate industry is expected to incur about $937 million in costs. Some of the estimated costs already are occurring due to the listing of the arroyo toad and protective measures in place as a result of the listing. These costs include lands set aside for toad conservation to compensate for loss of toad habitat, and measures needed to protect the toad while construction is ongoing. Other projected costs are associated with military activities, changes in water supply, grazing and mining activities, and construction projects." According to the FWS, "[a]bout 54 percent of the proposed critical habitat is privately-owned; 39 percent is federally-owned; 6 percent is under state ownership, and 2 percent is owned by tribal governments."

In another case, the city of Phoenix estimates that replacing the water it loses from the designation of critical habitat for the southwest willow flycatcher, a bird, is a minimum of $147 million.[190]

The FWS estimated the costs identified in one multi-species recovery plan to be "about $1.3 billion over the next 20 years, or about $115 million annually."[191] The plan covers some 15 species that are associated with "vernal pools" in California and Oregon and the most prominent species associated with this plan are fresh water crustaceans commonly called 'fairy shrimp.'

Private parties in just the unincorporated areas of San Diego County have paid some $485 million to be covered by a habitat conservation plan that covers multiple species.[192] Figure 19 reveals the number of HCP's completed between 2001 and 2004.

Figure 19



VIII. Critical Habitat

Under Section 4 of the ESA critical habitat is designated. In practice, the act of designating or not designating critical habitat has been a subject of litigation and controversy. To date critical habitat has been designated for some 478 species. Some designations are for multiple species and in other instances, designated critical habitat for one species may overlap designated critical habitat for another.

When critical habitat is designated an economic impact analysis is to be produced. In practice, like critical habitat designation, production of economic impact analyses has been problematic. Staff found it difficult to obtain economic analysis documents that should be readily available to the public online.

Some economic analyses have resulted in determinations such as "less than $100 million."[193] Such assessments may have been based upon the notion that any economic impact related to the species, resulted primarily from the inclusion of the species on the endangered and threatened species list, and thus any additional economic impact resulting from the subsequent designation of critical habitat was not significant. This approach was

rejected by the courts. Because of court rulings and other reasons, the methodology used by the FWS in conducting these analyses has changed over time, frustrating a cumulative assessment of economic impact as identified in these analyses. The changes in the approaches to critical habitat economic impact assessments are complicated as is the history of and factors bearing upon agency use of critical habitat designations.

ESA prohibitions in Section 7 and Section 9 have a powerful effect on actions that may or do have an impact on endangered and threatened species and their habitat. Under Section 7, federal actions are prohibited from jeopardizing (possibly causing the extinction of) a species. Section 7 of the ESA also prohibits Federal actions from resulting in "adverse modification" of habitat that has been designated as being "critical" for an endangered or a threatened species. The "take" of listed species which encompasses the elements of "harm, harass, shoot, wound, kill, trap, capture or collect" or attempting to engage in these activities is enforced through the Section 9 of the ESA. By statute, the taking of endangered species is prohibited and the take of threatened species may be prohibited by the promulgation of regulation. Combinations of regulations and court rulings have fundamentally altered the structure of the ESA in which the mechanism of critical habitat was designed to function.

First, the FWS promulgated a regulation that essentially inverted the mechanism whereby take of threatened species may be prohibited to one in which take of threatened species may be permitted.[194] The ESA itself does not prohibit any activity that may take a threatened species unless a regulation prohibiting the action has been promulgated. Rather than promulgating regulations that prohibited specific actions from taking selected threatened species, the FWS promulgated a regulation that applied the take prohibition in general to all threatened species and has subsequently, on occasion, promulgated regulations that exempt specific actions with regard to specific species. In essence, for regulatory purposes, the distinction between endangered and threatened species was eliminated. All takes of threatened species have been prohibited rather than only those specified by specific regulation.

Second, the term take including the elements "harm" and "harass" has been interpreted broadly. Unlike the other elements of take (kill, hunt, wound, shoot, capture, trap or collect) that indicate a close and direct relationship between the person committing a take and the species that is being taken with the method of take linking the two, harm has been interpreted to include actions in which the injury done to the species can be part of a chain of events, such as might occur by habitat modification, that may even be somewhat subjective. For example, some type of construction could cause a species to abandon a foraging or nesting area for poorer quality foraging habitat resulting in the reduced vigor and eventual death of the species. In response to legal challenges the Supreme Court determined that there are limits to how expansively habitat modification may be interpreted as "take" but a rather broad description of harm in regulation has been upheld.[195]

However, unlike 'shoot' or 'trap', proximate taking of endangered species by harming them may involve a relatively subjective assessment by agency biologists. Consequently, threatened species are essentially the same as endangered species unless specific regulations are otherwise promulgated and actions that modify habitat, may be

prohibited if the agency determines that the actions will proximately result in a 'take' of a species. This is true whether the habitat has been designated as critical or not. The agencies' consultation manual asserts that in some cases it may not be possible to find the body of a species that has been taken and that a dead species is not necessary to measure a 'take.'[196]

In combination, the above factors have created a situation whereby the additional regulatory authority accrued with designation of critical habitat may not be as significant as it might otherwise have been. A conflict between individuals wishing to develop property in Texas and endangered cave invertebrates illustrates this use of the ESA's take provision with regard to activities that affect habitat.[197]

In 1983 Dr. Fred Purcell and his brother Judge Gary Purcell purchased and subsequently invested millions in developing a 216 acre property. FWS subsequently listed several cave dwelling invertebrate species as endangered including the Bee Creek Cave harvestman, the Bone Cave harvestman, the Tooth Cave pseudoscorpion, the Tooth Cave spider, the Tooth Cave ground beetle, and the Kretschmarr Cave mold beetle. These species occur in several caves and sinkholes on the property of the Purcell's and other nearby properties.

Kretschmarr Cave mold beetle

So that development might proceed, the Purcells deeded several caves and over 10 acres of buffer zones surrounding the caves to a non-profit foundation dedicated to the research of environmental issues. Ultimately, the Purcells' dedication of the preserves was unsatisfactory to the FWS and development was thwarted for over a decade. At one point, the FWS threatened Dr. Purcell with criminal prosecution for violation of the ESA's 'take' prohibition. The action alleged to constitute a criminal take included clearing brush. The Purcells sought an incidental take permit, meeting with FWS officials numerous times with development proposals. In a 1998 meeting a FWS official produced a map indicating that development was prohibited on all but a few, isolated tracts of land. Of the 216 acres in Tracts A-E, the map indicated that development was prohibited on Tracts A, B, C, F and G and on 40 acres of the 74 acre C tract and 37.3 acres of the 47 acre D Tract leaving the E tract which according to the plaintiffs consists of steep canyons and which is inaccessible by road. Conflict with the FWS led to the Purcells initiating several legal challenges through their partnership, GDF Realty, Ltd, and eventually, to GDF Realty, Ltd. filing for bankruptcy.

No critical habitat has been designated for any of these cave dwelling invertebrates and brush clearing is not done inside caves. The FWS was interpreting the take prohibition to allow them to exert regulatory authority over the Purcells' property because the habitat modification might take these listed species.

The Purcells' case reveals how the application of take can reduce the incremental increase in regulatory authority stemming from the designation of critical habitat. In

addition to having historically provided limited increases in regulatory authority in many instances, the process of designating critical habitat can be politically charged, resource intensive and requires that agencies complete an economic impact assessment to document the resulting regulatory burden. These aspects of critical habitat designation are not likely viewed as benefiting the implementing agencies.

Given this reality, the disparaging FWS statements with regard to the value of ESA critical habitat mechanism are not surprising. The FWS has opined:

> In 30 years of implementing the ESA, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of conservation resources. The Service's present system for designating critical habitat is driven by litigation rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits and to comply with the growing number of adverse court orders. As a result, the Service's own proposals to undertake conservation actions based on biological priorities are significantly delayed.[198]

A recent court ruling (Gifford Pinchot Task Force v. USFWS)[199] has, however, presented a much lower threshold for a determination with regard to the destruction or adverse modification of critical habitat and altered this dynamic. The Court's reasoning was that Section 7of the ESA requires federal agencies to avoid the destruction or adverse modification of critical habitat. Then the court looked to regulations. Existing regulations define "destruction or adverse modification" to be '"...an alteration that appreciably diminishes the value of critical habitat for survival and recovery..." Agency regulations also define jeopardy as an action that "... reduces the likelihood of both the survival and recovery of the species." Relying on these definitions, the court found that determinations regarding adverse modification of critical habitat had to consider not only the species' survival but also the effects on recovery of the species. In the court's view, the ESA sets the threshold for initiating section 7 consultation at the point in which a federal action would reduce the likelihood of recovery which is lower than the jeopardy standard which would be triggered only if the federal action would rise to the level of possibly leading to extinction of the species.

Regardless of the FWS opinion before or after the Pinchot decision, critical habitat must be designated under the ESA and economic analyses are to accompany such designations. To date, critical habitat has been designated for some 478 species. The costs involved in just printing proposed and final rules for critical habitat can be quite substantial. According to the FWS, FY 05 costs for printing in the Federal Register were $465 per page of text and $495 for each full page map.[200] The California tiger salamander critical habitat designation is some 80 pages including some 30 full page maps.[201] Using FY05 costs for printing puts just the printing cost of this critical habitat rule at just over $38,000.[202]

Economic impact assessments conducted with critical habitat designations vary significantly as some examples for California reveal but indicate that costs imposed on other governmental agencies and private parties are large. The economic impact of the designations may be reduced by excluding areas if the Secretary finds that the benefits of the exclusion outweigh benefits of inclusion and provided that the Secretary does not find that the "failure to designate such area as critical habitat will result in the extinction of the species..." For example, the final critical habitat designation for the Riverside fairy shrimp was dramatically reduced as an economic impact assessment had found that "the cost of conserving the shrimp over the next 20 years could exceed $500 million."[203]

- California Coastal Gnatcatcher, $915 million over 20 years;[204]
- California tiger salamander, lower bound scenario of $105 million and an upper bound scenario of $411 million;[205]
- Inyo California towhee, "less than $100 million";[206]
- San Bernadino Merriam's kangaroo rat, between $4.4 million and $28.2 million;[207]
- Quino checkerspot butterfly, between $3.5 million and $14.1 million;[208]
- Bay checkerspot butterfly, $6.5 million;[209]
- San Bernadino Mountains bladderpod, between $38,000 and $116,000;[210]
- Western snowy plover, "none expected;"[211]
- Zayante Band-winged grasshopper, "minimal."[212]

Roughly 10,940,398 acres, over 10 percent of California, has been designated as critical habitat just for FWS species. According to the FWS this includes 60 percent federal, 30 percent private, 8 percent state and 2 percent tribal and other lands.[213] NMFS critical habitat designations increase the total acreage designated in California substantially. (See Appendix 6 for maps depicting FWS critical habitat designations in California).

Tables 9, 10, and 11 show FWS species with designated critical habitat in California, and the species for which and the amount of habitat that has been designated as critical in Florida and Texas respectively.

Table 9 – California FWS Species with Critical Habitat

Common Name	Scientific Name	Year Listed	Status
Amargosa nitrophila	*Nitrophila mohavensis*	1985	Endangered
Amargosa vole	*Microtus californicus scirpensis*	1984	Endangered
Antioch Dunes evening primrose	*Oenothera deltoides ssp. howellii*	1978	Endangered
Baker's larkspur	*Delphinium bakeri*	2000	Endangered
Bay checkerspot butterfly	*Euphydryas editha bayensis*	1987	Threatened
Butte County meadowfoam	*Limnathes floccosa ssp. californica*	1992	Endangered
California condor	*Gymnogyps californianus*	1967	Endangered
California red-legged frog	*Rana aurora draytonii*	1996	Threatened
California tiger salamander (Santa Barbara County Pop.)	*Ambystoma californiense*	2004	Threatened
Camatta Canyon amole	*Chlorogalum purpureum var. reductum*	2000	Threatened
Coachella Valley fringe-toed lizard	*Uma inornata*	1980	Threatened
Coastal California gnatcatcher	*Polioptila californica californica*	1993	Threatened
Conservancy fairy shrimp	*Branchinecta conservatio*	1994	Endangered
Contra Costa goldfields	*Lasthenia conjugens*	1997	Endangered
Contra Costa wallflower	*Erysimum capitatum var. angustatum*	1978	Endangered
Cushenbury buckwheat	*Eriogonum ovalifolium var. vineum*	1994	Endangered
Cushenbury milk-vetch	*Astragalus albens*	1994	Endangered
Cushenbury oxytheca	*Oxytheca parishii var. goodmaniana*	1994	Endangered
Delta green ground beetle	*Elaphrus viridis*	1980	Threatened
Delta smelt	*Hypomesus transpacificus*	1993	Threatened
Desert pupfish	*Cyprinodon macularius*	1986	Endangered
Desert tortoise	*Gopherus agassizii*	1980	Threatened
Fleshy owl clover	*Castilleja campestris ssp. succulenta*	1997	Threatened
Fresno kangaroo rat	*Dipodomys nitratoides exilis*	1985	Endangered
Gaviota Tarplant	*Hemizonia increscens ssp. villosa*	2000	Endangered
Green's tuctoria	*Tuctoria greenei*	1997	Endangered
Hairy orcutt grass	*Orcuttia pilosa*	1997	Endangered
Inyo California towhee	*Pipilo crissalis eremophilus*	1987	Threatened
Keck's checkermallow	*Sidalcea keckii*	2000	Endangered
Kneeland Prairie pennycress	*Thlaspi californicum*	2000	Endangered
La Graciosa thistle	*Cirsium loncholepis*	2000	Endangered
Large flowered fiddleneck	*Amsinckia grandiflora*	1985	Endangered
Least Bell's vireo	*Vireo bellii pusillus*	1986	Endangered
Little Kern golden trout	*Oncorhynchus aguabonita whitei*	1978	Threatened
Lompoc yerba santa	*Eriodictyon capitatum*	2000	Endangered

Common Name	Scientific Name	Year Listed	Status
Longhorn fairy shrimp	*Branchinecta longiantenna*	1994	Endangered
Marbled murrelet	*Brachyramphus marmoratus marmoratus*	1992	Threatened
Monterey spineflower	*Chorizanthe pungens var. pungens*	1994	Threatened
Morro Bay kangaroo rat	*Dipodomys heermanni morroensis*	1970	Endangered
Morro shoulderband snail	*Helminthoglypta walkeriana*	1994	Endangered
Northern spotted owl	*Strix occidentalis caurina*	1990	Threatened
Otay tarplant	*Deinandra (=Hemizonia) conjugens*	1998	Threatened
Owens tui chub	*Gila bicolor snyderi*	1985	Endangered
Palos Verdes blue butterfly	*Glaucopsyche lygdamus palosverdesensis*	1980	Endangered
Parish's daisy	*Erigeron parishii*	1994	Threatened
Peirson's milk-vetch	*Astragalus magdalenae var. peirsonii*	1998	Threatened
Penninsular bighorn sheep	*Ovis canadensis*	1998	Endangered
Purple Amole	*Chlorogalum purpureum var. purpureum*	2000	Threatened
Quino checkerspot butterfly	*Euphydryas editha quino*	1997	Endangered
Robust spineflower	*Chorizanthe robusta (incl. vars. robusta and hartwegii)*	1994	Endangered
Sacramento orcutt grass	*Orcuttia viscida*	1993	Endangered
San Bernardino kangaroo rat	*Dipodomys merriami parvus*	1998	Endangered
San Bernardino Mountains bladderpod	*Lesquerella kingii ssp. bernardina*	1994	Endangered
San Diego fairy shrimp	*Branchinecta sandiegonensis*	1997	Endangered
San Joaquin orcutt grass	*Orcuttia inaequalis*	1997	Threatened
Santa Ana sucker	*Catostomus santaanae*	2000	Threatened
Santa Cruz tarplant	*Holocarpha macradenia*	2000	Threatened
Scotts Valley polygonum	*Polygonum hickmanii*	2003	Endangered
Scotts Valley spineflower	*Chorizanthe robusta (incl. vars. robusta and hartwegii)*	1994	Endangered
Slender orcutt grass	*Orcuttia tenuis*	1997	Threatened
Solano grass	*Tuctoria mucronata*	1978	Endangered
Tidewater goby	*Eucyclogobius newberryi*	1994	Endangered
Valley elderberry longhorn beetle	*Desmocerus californicus dimorphus*	1980	Threatened
Ventura Marsh milk-vetch	*Astragalus pycnostachyus var. lanosissimus*	2001	Endangered
Vernal pool fairy shrimp	*Branchinecta lynchi*	1994	Threatened
Vernal pool tadpole shrimp	*Lepidurus packardi*	1994	Endangered
Western snowy plover	*Charadrius alexandrinus nivosus*	1993	Threatened
Yellow larkspur	*Delphinium luteum*	2000	Endangered
Zayante Band-winged grasshopper	*Trimerotropis infantilis*	1997	Endangered

Table 10- Florida FWS Species with Critical Habitat

Common Name	Scientific Name	Year Listed	Status	Acreage
American Crocodile	Crocodylus acutus	1975	Endangered	780,000
Cape Sable seaside sparrow	Ammodramus maritimus mirabilis	1967	Endangered	197,000
Choctawhatchee beach mouse	Peromyscus polionotus allophrys	1985	Endangered	750
Everglade snail kite	Rostrhamus sociabilis plumbeus	1967	Endangered	841,000
Gulf sturgeon	Acipenser oxyrinchus desotoi	1997	Threatened	611,000 plus 650 river miles
Perdido Key beach mouse	Peromyscus polionotus trissyllepsis	1985	Endangered	1,000
Piping plover	Charadrius melodus	1985	Endangered	44,000
Rice rat	Oryzomys palustris natator	1991	Endangered	10,000
West indian manatee	Trichechus manatus	1967	Endangered	1,200,000
			Total Acres	3,684,750 plus 650 river miles

Table 11 - Texas FWS Species with Critical Habitat

Common Name	Scientific Name	Year Listed	Status	Acreage
Braken Bat Cave Meshweaver	Cicurina venii	2000	Endangered	85
Cokendolpher Cave Harvestman	Texella cokendolpheri	2000	Endangered	57
Concho water snake	Nerodia paucimaculata	1986	Threatened	20,229
Fountain darter	Etheostoma fonticola	1970	Endangered	46
Ground bettle [unamed]	Rhadine exilis	2000	Endangered	687
Ground bettle [unamed]	Rhadine infernalis	2000	Endangered	724
Helotes mold beetle	Batrisodes venyivi	2000	Endangered	119
Houston toad	Bufo houstonensis	1970	Endangered	84,475
Leon springs pupfish	Cyprinodon bovinus	1980	Endangered	13
Madla's Cave Meshweaver	Cicurina madla	2000	Endangered	282
Pipping plover	Charadrius melodus	1985	Endangered	275,187
Robber Baron Cave Meshweaver	Cicurina baronia	2000	Endangered	57
San Marcos Gambusia	Gambusia georgei	1980	Endangered	20
San Marcos salamander	Eurycea nana	1980	Threatened	21
Texas wild-rice	Zizania texana	1978	Endangered	61
Whooping Crane	Grus americana	1967	Endangered	197,412
Zapata Bladderpod	Lesquerella thamnophila	1999	Endangered	5,346
			Total Acres	584,821

IX. Findings

- A small number of species have been delisted or downlisted as a result of successful ESA recovery efforts;
- Available data indicate that the vast majority of listed species (77 percent) are in the lowest quarentile (0-25 percent) of 'recovery achieved';
- Of species included in the most recent FWS report 39 percent are "uncertain", 30 percent are "declining', 21 percent are "stable" 6 percent are "improving", 3 percent are "possibly extinct" and 1 percent are believed only to exist in captivity;
- About 30 or more currently listed species are assessed as "possibly extinct";
- Given the relative rate of listing and delistings, the potential pool for future listings, the costs associated with the process along with the workload placed upon the implementing agencies and the economic impacts, the current program does not appear sustainable;
- Despite being enforced for more than three decades, there is a consistent lack of reliable qualitative information about the condition of endangered and threatened species regulated under the ESA;
- A higher "recovery achieved" ranking for a species does not necessarily indicate actual improvement in the condition of the species;
- Because much of the available data for the program is subjective and can reflect factors other than what they would seem to reflect, there is insufficient information upon which to draw general conclusions, other than on an anecdotal basis, regarding the ESA's effectiveness in conserving or 'saving' listed species;
- Data may indicate that species are "improving" or "stable" when there has been no actual change in the condition of the species (i.e. there may have been no actual increase in the species' numbers, populations or distribution) and the assessment of these statuses can reflect corrections to earlier erroneous data;
- Species listed on the basis of erroneous data consume funds that could otherwise be directed to species that are actually endangered or threatened;.
- The assessment of recovery priorities for listed species appears heavily skewed and is likely inaccurate in many cases;
- Although not clearly contemplated in the ESA, it may not be possible to recover some listed species to the point at which protections under the ESA are no longer necessary;

- Although improved in recent years, current expenditure reporting misses federal government expenditures on listed species;

- The completeness of state listed species expenditure reporting cannot be assessed from current reports and may underestimate state expenditures;

- Current reporting does not capture expenditures of governmental units below the state level or by private parties;

- By weighted average, biological species do not receive greater funding over subspecies or lesser taxonomic units;

- The distinction between endangered and threatened species has been blurred;

- A combination of factors has altered the framework under which critical habitat was designed to function.

X. Recommendations

- A meaningful distinction between threatened and endangered species should be established.

- More rigorous criteria for the determination of endangered and threatened species should be established. Consistent with the Data Quality Act the implementing agencies should require more rigorous criteria in listing decisions.

- As threat to species should be contemplated in the determination between "threatened" and "endangered" status, altering the priority system to first consider taxonomic uniqueness could, in general, increase the program's focus on relatively more unique animals and plants.

- A number of species were likely listed on the basis of erroneous data and should, as well as some that are 'possibly extinct', be delisted. A more simplified mechanism for delisting species may improve program efficiencies. The appropriateness of current designations should be thoroughly assessed including endangered status and recovery priority.

- Mechanisms that reduce the resource consuming nature of Section 4 determinations should be considered to make the program more effective and allow an increased focus on recovery.

- The data for the Report to Congress and the Species by Species Expenditure Reports should be made available in an online searchable electronic format. This would increase the authorizing and appropriating committees' abilities to review the program and increase public accessibility to information about the program. The data should be searchable by the individual species (perhaps in association

with the FWS TESS database (Threatened and Endangered Species Database System)). The data should also be searchable by different fields (i.e. searches by agency or state making expenditures, species status, species' range states etc.).

- Specific requirements as to the type and amount of data to be included in the Report to Congress could increase the usefulness of the reports for assessing and managing the program. The report could include population and distribution data including trend data, an assessment of the data's reliability and a description of the objective and measurable criteria established pursuant to the Act's Sec.4(f)(1)(B)(ii).

- Economic impact assessments conducted in association with critical habitat designations should be easier to locate online. Electronic copies of these documents should be consistently available on the FWS TESS database.

- Requiring states that receive Section 6 of the ESA funding to report state expenditures (including those expenditures from other than natural resources departments or fish and wildlife agencies specifically charged with endangered species management) may provide a more complete picture of state ESA expenditures.

- Provision for lesser governmental entities to voluntarily report ESA expenditures may provide a more complete picture of governmental ESA expenditures. This might be accomplished electronically, allowing the appropriate official to certify the accuracy of the information. Similarly, a provision for private entities to voluntarily electronically report and to attest to the accuracy of the reported expenditures may provide a more complete picture of total ESA expenditures.

XI. Appendices

Appendix 1: Delisted Species Report as of 5/4/05

Date Species First Listed	Date Delisted	Species Name	Reason Delisted
3/11/1967	6/4/1987	Alligator, American (Alligator mississippiensis)	Recovered
11/6/1979	10/1/2003	Barberry, Truckee (Berberis (=Mahonia) sonnei)	Original data in error (Taxonomic revision)
2/17/1984	2/6/1996	Bidens, cuneate (Bidens cuneata)	Original data in error (Taxonomic revision)
8/27/1984	2/23/2004	Broadbill, Guam (Myiagra freycineti)	Extinct
4/28/1976	8/31/1984	Butterfly, Bahama swallowtail (Heraclides andraemon bonhotei)	Original data in error (Act amendment)
10/26/1979	6/24/1999	Cactus, Lloyd's hedgehog (Echinocereus lloydii)	Original data in error (Taxonomic revision)
11/7/1979	9/22/1993	Cactus, spineless hedgehog (Echinocereus triglochidiatus var. inermis)	Original data in error (Not a listable entity)
9/17/1980	8/27/2002	Cinquefoil, Robbins' (Potentilla robbinsiana)	Recovered
3/11/1967	9/2/1983	Cisco, longjaw (Coregonus alpenae)	Extinct
7/24/2003	7/24/2003	Deer, Columbian white-tailed Douglas County DPS (Odocoileus virginianus leucurus)	Recovered
6/2/1970	9/12/1985	Dove, Palau ground (Gallicolumba canifrons)	Recovered
3/11/1967	7/25/1978	Duck, Mexican U.S.A. only (Anas "diazi")	Original data in error (Taxonomic revision)
6/2/1970	8/25/1999	Falcon, American peregrine (Falco peregrinus anatum)	Recovered
6/2/1970	10/5/1994	Falcon, Arctic peregrine (Falco peregrinus tundrius)	Recovered
6/2/1970	9/12/1985	Flycatcher, Palau fantail (Rhipidura lepida)	Recovered
4/30/1980	12/4/1987	Gambusia, Amistad (Gambusia amistadensis)	Extinct
4/29/1986	6/18/1993	Globeberry, Tumamoc (Tumamoca macdougalii)	Original data in error (New information discovered)
3/11/1967	3/20/2001	Goose, Aleutian Canada (Branta canadensis leucopareia)	Recovered
10/11/1979	11/27/1989	Hedgehog cactus, purple-spined (Echinocereus engelmannii var. purpureus)	Original data in error (Taxonomic revision)
12/30/1974	3/9/1995	Kangaroo, eastern gray (Macropus giganteus)	Recovered

12/30/1974	3/9/1995	Kangaroo, red (Macropus rufus)	Recovered
12/30/1974	3/9/1995	Kangaroo, western gray (Macropus fuliginosus)	Recovered
6/2/1977	2/23/2004	Mallard, Mariana (Anas oustaleti)	Extinct
4/26/1978	9/14/1989	Milk-vetch, Rydberg (Astragalus perianus)	Original data in error (New information discovered)
6/2/1970	9/21/2004	Monarch, Tinian (old world flycatcher) (Monarcha takatsukasae)	Recovered
6/2/1970	9/12/1985	Owl, Palau (Pyrroglaux podargina)	Recovered
6/14/1976	1/9/1984	Pearlymussel, Sampson's (Epioblasma sampsoni)	Extinct
Not available	2/4/1985	Pelican, brown U.S. Atlantic coast, FL, AL (Pelecanus occidentalis)	Recovered
7/13/1982	9/22/1993	Pennyroyal, Mckittrick (Hedeoma apiculatum)	Original data in error (New information discovered)
3/11/1967	9/2/1983	Pike, blue (Stizostedion vitreum glaucum)	Extinct
10/13/1970	1/15/1982	Pupfish, Tecopa (Cyprinodon nevadensis calidae)	Extinct
9/26/1986	2/28/2000	Shrew, Dismal Swamp southeastern (Sorex longirostris fisheri)	Original data in error (New information discovered)
6/4/1973	10/12/1983	Sparrow, Santa Barbara song (Melospiza melodia graminea)	Extinct
3/11/1967	12/12/1990	Sparrow, dusky seaside (Ammodramus maritimus nigrescens)	Extinct
11/11/1977	11/22/1983	Treefrog, pine barrens FL pop. (Hyla andersonii)	Original data in error (New information discovered)
9/13/1996	4/26/2000	Trout, coastal cutthroat Umpqua R. (Oncorhynchus clarki clarki)	Original data in error (Taxonomic revision)
6/14/1976	2/29/1984	Turtle, Indian flap-shelled (Lissemys punctata punctata)	Original data in error (Erroneous data)
6/16/1994	6/16/1994	Whale, gray except where listed (Eschrichtius robustus)	Recovered
Not available	4/1/2003	Wolf, gray U.S.A. (delisting of all other lower 48 states or portions of lower 48 states not otherwise included in the 3 distinct population segments). (Canis lupus)	Original data in error (Taxonomic revision)
7/19/1990	10/7/2003	Woolly-star, Hoover's (Eriastrum hooveri)	Recovered & Original data in error (New information discovered)

Appendix 2: Active Lawsuits 2/16/05

Region (FO)	Species	Case Name (Case no.; Court)	Issue/Allegation	Date (Filed)	Note	SOL	DOJ
R6	2 R6 milk-vetches: Homgren and Shivwit's milk-vetch	CBD v. Williams (04-1651-HHK : D. D.C)	failure to designate CH, implement RP	09/27/2004	SM dates: pch 7/20/07; fch 7/18/08.	No Attorney Identified	Flax
R4	3 beach mice. Alabama Beach Mouse, Perdido Beach Mouse and Choctawhatchee Beach Mouse	Sierra Club and CBD v. Norton (No. 03 377-CB-C ; S.D. Alab.)	Failure to revise CH	06/17/2003	Cross MSJ filed 12/20/04. S'ment memo dates: 11/15/05, 9/30/06 PK-CBM; 1/18/06, 1/15/07 ABM.	R-Mott	McNeil, B
R6	4 R6 species: Gunnison's prairie dog, Dakota skipper, Black Hills mountain snail, Uinta moutainsnail	Biodiversity Conservation Alliance, et al. v. Norton (1:04-cv-02026-GK ; D.D.C.)	Failure to make 90-day findings	11/18/2004	Answer due January 18	No Attorney Identified	Flax
R1	6 Southern CA plants (Big Bear Valley sandwort, ash-gray Indian painbrush, s. mountain buckwheat, San Bernardino bluegrass, CA dandelion, Hidden Lake bluecurls)	CBD and CNPS v. Norton (04-1150 RT SGLx . C.D. Cal.)	Failure to designate CH	09/13/2004	Answer filed 11/19/04.	R-O'hara	Russell
R4	Agave eggersiana and Solanum conocarpum	CBD v. Norton (1:04-CV-2553 ; N.D. Ga.)	Failure to issue a 12m finding	09/01/2004	Answer filed 11/8/04. SM date. 2/28/06	R-Stevens	Eitel
R4	Alabama sturgeon	Alabama-Tombigbee Rivers Coalition et al., v. Babbitt (CV-01-P-0194-S ; N D Ala)	APA/FACA challenge to listing	01/24/2001	5/04: Briefing on Ps request for an evidentiary hearing	No Attorney Identified	Cohen
R2	Aplomado falcon	Forest Guardians et al v. FWS (CIV-05-0001 ; D. N M)	Failure to make petition findings on petition to revise CH	01/03/2005	Answer due ?	R-Schoessler	Eitel
R6	Arctic grayling	CBD and Western Watersheds Project v. FWS (103CV01110 ; D. D.C)	Emergency listing/12-month finding	05/21/2003	12/14/04 order: supp record by 1/13/05. Brief due 2/3/05; reply due 3/7/05	No Attorney Identified	Isenberg
R4	Blue shiner and	CBD et al. v	Failure to	09/02/2004	Reply brief	R-Stevens	Eitel

	Goldline darter	Hamilton, et al. (1:04-CV-2573 . N.D. Ga.)	designate CH		filed 12/13/04 (Mo. to dismiss based on expiration of SoL).		
R8	Buena Vista Lake Shrew	Kern County Farm Bureau, et al., v. Badgley and CBD (CIV F-02-5376 AWI DLB ; E.D. Cal.)	merits of listing, violation of APA, failure designate CH (cross-claim)	04/09/2002	1/12/04 CO. win on merits of listing; pCH due 7/12/04, fCH 1/12/05 (publish by). On appeal.	R-Monroe	Whittle
R1	Bull trout (Columbia River, Klamath Basin)	Alliance for the Wild Rockies and Friends of the Wild Swan v. Allen (04-1813 BR ; D. Ore.)	Merits of CH	12/14/2004	Answer due?	R-Swan	Williams
R1	California spotted owl	CBD v. Norton (3:04-cv-01861-VRW ; N. D. Cal.)	Challenge to 12 month (not warranted) finding	05/11/2004	Reply brief due 2/23/05	R-O'hara	Floom
R1	California tiger salamander (Rangewide + Sonoma and Central CH)	CBD and EDC v. FWS (C-04-4324 FMS ; N D. Cal.)	Challenge of rangewide rule and failure to designate CH for Sonoma and Central pops	10/13/2004	Answer filed 12/13/04. SA pending for CH claims. Admin record due 2/28/05.	R-Monroe	McNeil, B
R1	California tiger salamander (Santa Barbara County and Sonoma County DPSs)	Home Builders Association of N. CA v. Williams, Norton and Thompson (CIV.S-04-0345 LKK GGH ; E.D. Cal.)	Merits of listing, DPSs invalid	02/19/2004	Joint mo to dismiss filed 10/1/04. Hrg held 11/19/04. Ct to issue dismissal order.	R-Monroe	McNeil, B
R1 R5 R6	Canada lynx, merits of listing and counterpart regs	DOW v. Norton (1:04CV01230 ; D.D.C. (GK))	threatened status (uplist to endangered); counterpart regs	07/22/2004	Answer submitted 9/23/04, initial scheduling conference 10/29/04	No Attorney Identified	Floom
R2	Cicurina cueva	Save Our Springs Alliance v. Norton (A04CA314 LY ; W. D Tex.)	Failure to make a 90-day finding.	05/25/2004	Fully briefed. SM dates: 90d, 1/20/05; 12m 12/8/05.	R-Tade	Rodriguez
R1	Coastal cutthroat trout, southwestern Washington/Columbia River DPS	CBD, et al. v. USFWS (05-0165 ; D. Ore.)	Merits of withdrawal of proposed rule	02/03/2005	Answer due ?	No Attorney Identified	No Attorney Identified

R6	Colorado River cutthroat trout	Colorado River Cutthroat Trout v. Norton (Civ. No. 1:00-CV-2497 ; D D.C.)	ments of "not substantial" 90-day finding	08/20/2004	Answer due 11/19/04, Admin Rec 12/20/04	No Attorney Identified	Floom
R6	Douglas County (Northern) pocket gopher	Center for Native Ecosystems and Forest Guardians v. Norton (05-Rb-188 (OES) ; D. Color.)	failure to make petition findings	02/02/2005	petition submitted 3/20/03	AUSA-Amanda Roque R-Graf	No Attorney Identified
R1 R6	Eastern Sage Grouse	Institute for Wildlife Protection v. Norton (CV 03-5006 (RBL) ; W.D. WA)	failure to make timely 90-day finding	01/06/2003	90-day published 1/6/04. On appeal 04-36067 (9th Cir.).	W-Goldfarb R-Graf	Baca
R1	Flat-tailed horned lizard	Tucson Herpetological Society v. Norton (04-CV-75 ; D-AZ)	Merits of withdrawal of proposed rule to list	10/30/2003	8/6/04: Briefing on the adequacy of the AR. Submit documents to ct by 11/5 for in camera review	No Attorney Identified	Govindan
R6	Graham's penstemon	Center for Native Ecosystems v. Norton (Civ. No. 03-M-2300 (PAC) ; D. Colorado)	failure to make petition findings	11/18/2003	will be made candidate in new CNOR, moot out case?	No Attorney Identified	No Attorney Identified
R6	Great Plains piping plover	Nebraska Habitat Conservation Coalition v. USFWS (4:03-CV 3059 ; Dist Neb)	Ments of CH, APA, NEPA	02/14/2003	2/04: briefing on Ps motion to supplement admin record	R-Zallen	Whittle
R1 R6	Grizzly bear (North Cascades Ecosystem population)	Northwest Ecosystem Alliance and DOW v. Norton (2:04-cv-01331-JCC ; D. Wash. Seattle div)	Ments WBP "reclassify," Emergency rule, RP	06/04/2004	Working on admin record to file w/answer.	No Attorney Identified	McNeil, B
R6	Gunnison sage grouse	American Lands Alliance v. Norton (1:04CV00434 ; D. D.C.)	Merits PMG, Emergency rule	03/17/2004	Admin record due 9/22 (extended); Status hearing Oct 21	R-Graf	Maysonnet te
R1	Island marble butterfly	Xerces Society v. Norton (C 04-2041 Z ; W D	Failure to make 90-day and 12-month findings	09/28/2004	Answer filed 12/20/04. SM dates	R-Nagle	Eitel

		Wash)			90d-2/5/06; 12m-11/5/06		
R8	Kootenai River population of white sturgeon	Center for Biological Diversity and Ecology Center v. US ACOE and US FWS (CV 03-29-M-DWM ; D. Mont., Missoula Div)	ments of CH (not enough); ACOE continued jeop.	02/21/2003	Briefing schedule: cross SJ, 11/19/04; Response. 12/20/04; reply, 1/14/05.	R-Nagle	Lowery
R1	Mono Basin sage grouse	Institute for Wildlife Protection and Dr. Herman v. Norton and Williams (CO2-1404 P ; W. D. WA)	Failure make timely 90-day finding; emergency listing	07/03/2002	CO 12/3/03 in favor of D's. On appeal (04-35104)	No Attorney Identified	No Attorney Identified
R6	Prebles Meadow jumping mouse (Mountain States Legal Foundation)	Mountain States Legal Foundation v Norton (03 CV 250J ; D. WY)	merits listing threatened and CHD	12/09/2003	Stayed pending decision on delisting.	No Attorney Identified	Howell
R6	Prebles meadow jumping mouse	City of Greely v. US FWS (Civ. 03-1607 (OES) ; Dist. Colorado)	merits of critical habitat designation	08/22/2003	Stayed pending a delisting decision.	No Attorney Identified	No Attorney Identified
R1	Pygmy rabbit (rangewide)	Western Watersheds Project, et al. v. USFWS (CIV 04-440-N-LMB ; D Idaho)	Failure to issue 90d/12m petition findings	08/31/2004	Response brief due 1/28/05. SM dates: 90d, 5/16/05; 12m, 2/15/06.	AUSA-Ferguson R-Koch	No Attorney Identified
R1	Rio Grande cutthroat trout	CBD v. Norton (CIV-03-0252 ; D N.M.)	merits of not warranted finding	02/25/2003	9/04. Briefing on Ps petition for review of agency action	R-Spaulding	Govindan
R2	Roundtail and headwater cubs	CBD v. Norton (04-CV-496 ; D. Ariz.)	Failure to make 90day and 12month findings	09/20/2004	Answer filed 11/29/04. SM dates: 90-1/13/06, 12m-10-20-06.	R-Spaulding	Eitel
R1	San Fernando Valley spineflower	CA Native Plant Society v. Norton ((1:03CV01540) RBW ; D.D.C)	Merits of WBP finding	07/17/2003	6/04: Briefing on SJ complete. 6/04: Briefing on SJ complete. Oral argument set for	R-O'hara	McNeil, B

2/18/05

R1	Slickspot peppergrass	Western Watersheds Project v. Norton (Civ 04-168-S-EJL ; D. Idaho)	Merits of withdrawal listing	04/05/2004	Cross SJ/response due 1/21/05	R-Viscusi	Whittle
R8	Unarmored 3-spine stickleback	City of Santa Clarita and Ventana Conservation and Land Trust v. Interior, et al. (CV -02-00697-GAF (RCx) ; C.D. Cal.)	Failure to designate CH; 2 Ventura BOs	01/24/2002	Admin record filed 7/21/04. Response brief due 1/18/05.	W-Goldfarb R-O'hara	Gustafson Weiland
R8	Unarmored threespine stickleback (CBD)	CBD, et al. v. USFWS (No. 04-55084 ; 9th Cir. Appeal)	failure to desginate CH (from 20 yrs ago)	01/08/2004	Ps Appeal of 11/12/03 dist ct order granting SJ for FWS	W-Goldfarb AUSA-Hikida R-O'hara	No Attorney Identified
R1	Western gray squirrel, Washington Population	Northwest Ecosystem Alliance v. USFWS (CV'03 1505 PA ; D. Or.)	Merits of not warranted finding	11/06/2003	8/2/04. Ct granted SJ in our favor. 9/15/04: Ps filed notice of appeal	R-Hoobler	Rizzardi
R1	Yosemite Toad and Mountain yellow-legged frog	Center for Biological Diversity v. Norton (03-CV-1758 ; E.D. Cal.)	merits of warranted but precluded finding	04/01/2003	6/22/04 Ct granted SJ for FWS. 8/4/04: Ps filed notice of appeal. Appellate brief due 1/19/05.	No Attorney Identified	Govindan
R1 R6	western sage grouse	Institute for Wildlife Protection v. Norton (CO 3-1251P ; W.D. Wash)	merits of "not substantial" 90-day finding	06/08/2003	8/10/04: Ct granted SJ for Service. On appeal 04-35912 (9th).	No Attorney Identified	McNeil, B

Active Lawsuit Summary

Type	Number of lawsuits	Number of species
90 day petition	10	12
1 year petition	9	13
Final listing	12	11
Critical habitat	11	19
Merits challenge	16	15
Freedom of information	0	0
Recovery	1	2
Other	7	9
Total	**33**	**43**

Appendix 3: The current FWS listing process – Approximate range of average costs of rulemaking

Approximate Cost Range in FY05

- Proposed Listing Rule ≈ $75,000 - $125,000
- Final Listing Rule ≈ $50,000 - $140,000
- 90-Day Petition Finding ≈ $15,000 - $50,000
- 12-Month Petition Finding ≈ $45,000 - $125,000 (has been as much as $625,000 for sage grouse)

- Cost per Federal Register page (see note below) = $465
- Cost per full map page submitted to Federal Register = $495

(*e.g.*, FR Costs per CH Rule ≈ $15,000 - $120,000)

Critical Habitat:

- Prior to 1978: 30 designations for 185 species
- From 1979 to 1990: 73 designations for 403 species
- Currently: 473 designations for 1,264 listed spp.

- Approx. Cost for Each Critical Habitat Designation:

  - Proposed CH ≈ $180,000 - $925,000
  - Final CH ≈ $72,000 - $560,000
  - Econ. Analysis ≈ $150,00 - $250,000
  - NEPA $25,000 – 415,000
  - Printing Costs ≈ $15,00 - $120,000

Listing Program Budget Allocation:

- FY04 ≈ $12.3 million w/ $8.9 million CH subcap
- FY05 ≈ $15.9 million w/ $11.6 million CH subcap

Note: Approximately three, double-spaced, typed pages in Microsoft Word equate to one page published in the Federal Register. One page published in the Federal Register costs $465.

Appendix 4: Cooperative Endangered Species Conservation Funds

	Fiscal Year 2001	Fiscal Year 2002	Fiscal Year 2003	Total
Total Traditional Grants to States:	7,803,400	8,203,906	8,165,223	24,172,529
Total HCP Planning Assistance Grant Awards:	663,500	6,650,000	6,606,775	19,891,775
Total HCP Land Acquisition Grants	68,389,365	51,784,400	51,136,439	171,310,204
Total Recovery Land Acquisition Grants	10,404,277	17,754,001	12,824,246	40,982,524

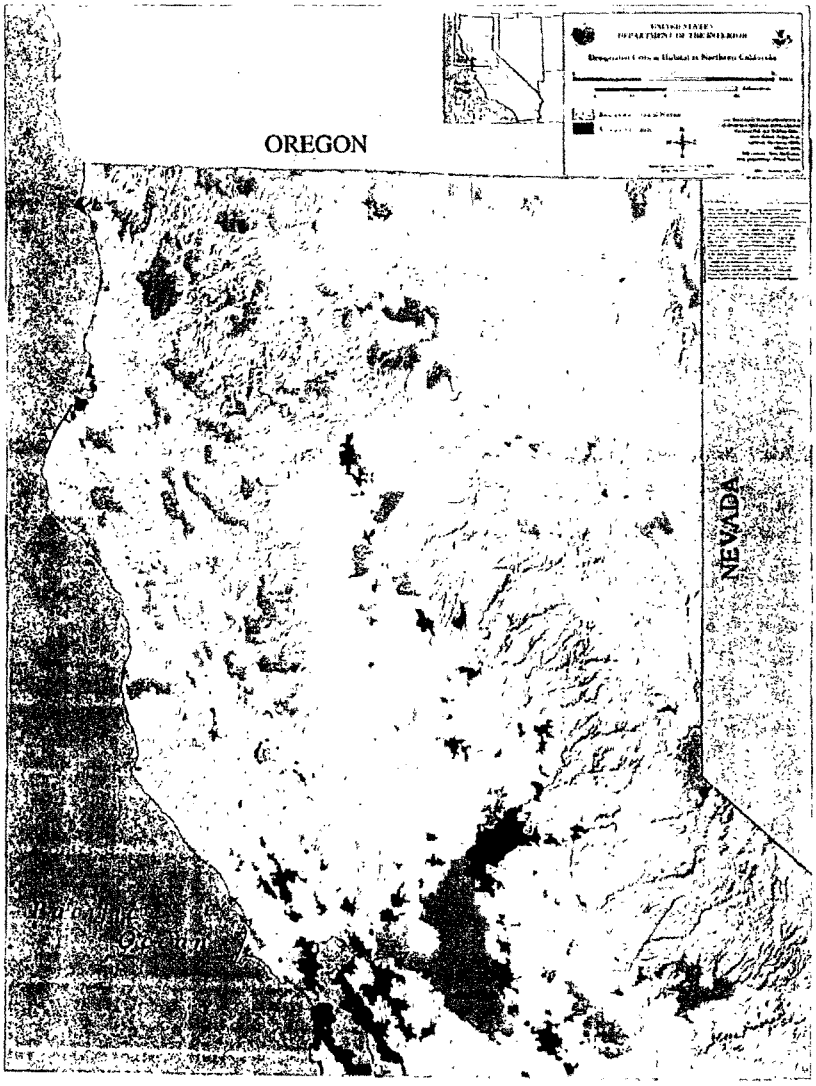
Appendix 5: Table of FWS ESA Actions

Action	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005 [2]
ESA Listing Budget	$6,341,000	$9,000,000	$9,077,000	$12,300,000	$16,175,000
Petitions Received and Awaiting Action (listing / delisting) [1]	3 / 0	11 / 5	15 / 2	23 / 3	0 / 2
90-day Findings Completed (listing / delisting) [1]	5 / 1	1 / 2	6 / 2	4 / 5	8 (14) / 0(6)
12-Month Findings Completed (listing / delisting) [1]	6 / 1	4 / 0	7 / 1	2 / 2	2 (6) / 1 (3)
Proposed Listings [1]	15	16	1	1	0 (2)
Final Listing Decisions [1]	14	14	6	7	3 (10)
Critical Habitat Proposals [1]	157	279	30	13	9 (18)
Critical Habitat Designations [1]	21	7	389	27	4 (35)
NOIs Received (Listing / Recovery)	> 56 / No data available	17 / No data available	49 / 15	32 / 5	3 / 1
Litigation Support ($$)	Do not track	Do not track	Do not track	Do not track	Do not track
Recovery Plans Drafted [1]	2	0	5	33	30
Final Recovery Plans Published [1]	20	30	20	12	8
Consultations Completed (Formal)	1,232	5,248	2,027	>4,000	No estimates available
Consultations Completed (Informal)	72,052	71,755	54,443	>71,000	No estimates available
HCPs Completed	40	45	24	38	No estimates available
Proposed Delisting Rules [1]	0	3	1	2	1 (3)
Final Delisting Rules [1]	1	1	3	4	0 (2)

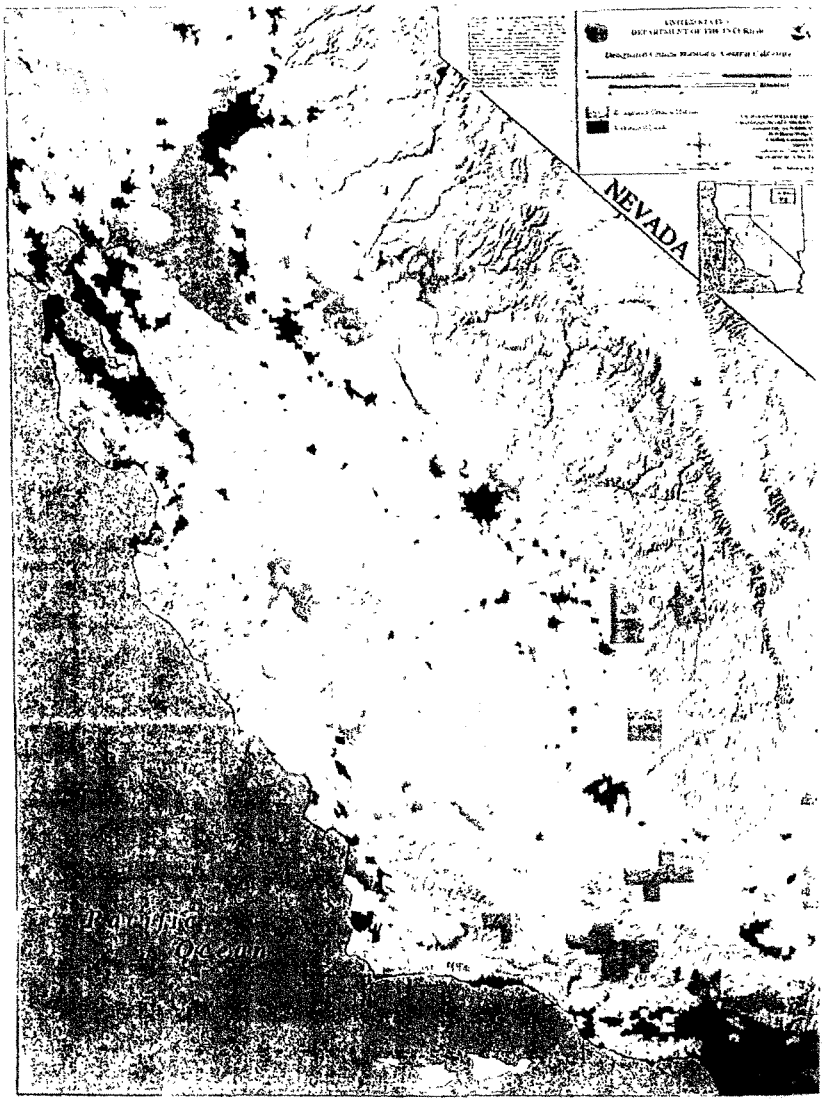
1. Reflects the number of species. For example, in FY 2001 there were 3 species that FWS was petitioned to list.
2. Numbers in the FY 2005 column are as of 2/3/05. Projected estimates, where possible, for the remainder of the FY are shown in parenthesis.

Appendix 6: Maps of California Critical Habitat

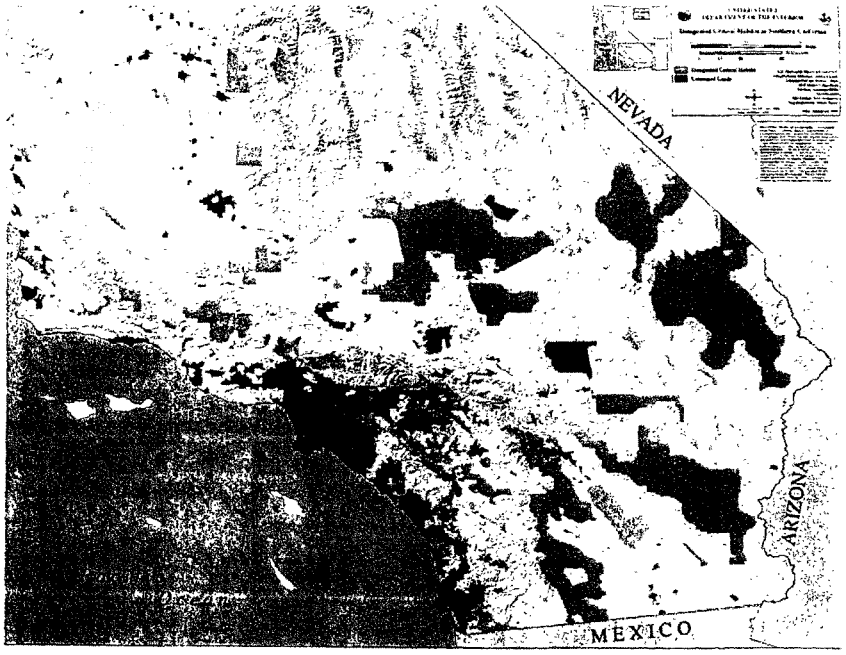
6A: Northern California: Green shading represents designated critical habitat and red shading represent metropolitan areas. The two may overlap.



6B: Central California



6C: Southern California



Endnotes

[1] Public Law 93-205, Approved Dec.28, 1973, 87 Stat. 884.
[2] The Secretary of Interior and the Secretary of Commerce are vested with authorities and obligations under the ESA. The secretaries have delegated administration of the ESA to the USFWS and NMFS respectively.
[3] The term "endangered" is used herein to encompass both "endangered" and "threatened" species unless otherwise noted. An "endangered" species is one that is in danger of extinction throughout all or a significant portion of its range. Sec.3 (6). A "threatened" species is one that is likely to become endangered in the foreseeable future. Sec. 3 (20) The term "species" is used herein to encompass species, subspecies and distinct population segments as in the ESA's definitions at Sec 3 (16). It is also used to encompass "Evolutionarily Significant Units," a NMFS term. See: 56 FR 58612-58618; November 20, 1991.
[4] Under the Endangered Species Act both domestic and foreign species may be listed. Species are added to a list published by the Secretary of Interior in accordance with Sec (4)(c). Foreign species are included on the list as the ESA is used by the United States as the implementing instrument for Convention on International Trade in Endangered Species of Wild Flora and Fauna. Additionally, a species may be included on the endangered list more than once. In explaining the number of US species FWS provides the following information: "*There are 1857 total listings (1292 U.S.). A listing is an E or a T in the "status" column of 50 CFR 17.11 or 17.12 (The Lists of Endangered and Threatened Wildlife and Plants). The following types of listings are combined as single counts in the table above: species listed both as threatened and endangered (dual status), and subunits of a single species listed as distinct population segments. Only the endangered population is tallied for dual status populations (except for the following: olive ridley sea turtle; for which only the threatened U.S. population is tallied. The dual status U.S. species that are tallied as endangered are: chinook salmon, gray wolf, green sea turtle, piping Plover, roseate tern, sockeye salmon, steelhead, Steller sea-lion. The dual status foreign species that are tallied as endangered are: argali, chimpanzee, leopard, saltwater crocodile. Distinct population segments tallied as one include: chinook salmon , chum salmon , coho salmon , dugong , gray wolf , Mariana fruit Bat (=Mariana flying fox) , steelhead. Entries that represent entire genera or families include: African viviparous toad, gibbons, lemurs, musk deer, Oahu tree snails, sifakas, uakari (all species).*
http://ecos.fws.gov/tess_public/TESSBoxscore
[5] USWFS, Budget Justifications and Performance Evaluation for Fiscal Year 2005. The estimated expenditures for 2004 do not include general business operation expenditures. While FWS's endangered species account is a figure that is often cited with regard to Federal investment in the endangered species program, monies from many other FWS accounts may also be directed to or benefit endangered species. For example, of 13 FY 2005 projects summarized under FWS's Land Acquisition account ($38.1 million estimated in 2004) for National Wildlife Refuges or Wildlife Management Areas, 11 include endangered or threatened species in the project description or purpose. Some of the other FWS accounts for which the ESA is cited as an authorizing statute include the State and Tribal Wildlife Grant Fund ($69 million enacted in 2004), the Private Stewardship Grant Program ($7.4 million estimated in 2004) and the Landowner Incentive Program ($26.6 million enacted in 2004).
[6] "ESA, PR, and NMFS Funding", undated, NMFS. NMFS spends additional monies on endangered species through accounts such as its Pacific Salmon Recovery Fund, which spent some $78 million in FY 2003 on species outside of Alaska. "Pacific Salmon Recovery Funding", undated, NMFS.
[7] Sec. 4 (f)(3) requires the Secretary of Interior to "report every two years...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 listed species for which such plans have been developed." The ESA's Sec. 18 requires the Secretary of Interior to provide an annual accounting of reasonably identifiable federal and state expenditures that are made primarily for the conservation of endangered and threatened species.
[8] Under Sec. 4 (c)(1) the Secretary of Interior is required to publish in the Federal Register and revise "from time to time" a list of all species determined to be endangered or threatened. See: Endangered and Threatened Wildlife and Plants 50 CFR 17.11 and 17.12, December 1999. Information regarding listed species is now available on the Service's website< http://endangered.fws.gov/wildlife.html#Species>.
[9] http://endangered.fws.gov/recovery/reports_to_congress/2001-2002/2001-2002_full_report.pdf
[10] 50 CFR 424.11(d).
[11] Three of the seven delisted foreign species were Australian kangaroos that FWS delisted on the basis of recovery. At delisting FWS stated, "...the four [Australian] states that commercially harvest kangaroos...had developed and implemented adequate and effective conservation programs that ensured the protection of these species. The Service additionally found that kangaroo populations were high and

that the three species were protected by appropriate legislation, had their populations regularly monitored by direct and indirect procedures, and were managed by a complex licensing system which regulated the extent of the legal harvest." 60 FR 12887-12906.

[12] According to FWS, following listing a "...literature review was conducted to see if supporting evidence justified its current endangered status. No such supporting data could be found." FWS also interviewed turtle experts, one of whom advised the Service, "[h]ow [the Indian flapshell turtle] ever made Appendix I [of the CITIES list] is a big mystery." 49 FR 7394-7398.

[13] Three of the foreign delisted species are birds native to Palau (the Palau dove, flycatcher and owl). 50 FR 37192-37194. According to the Government Accounting Office, "[a]lthough officially designated as recovered, the three Palau species owe their 'recovery' more to the discovery of additional birds than to successful recovery efforts." GAO, Endangered species management programs could enhance recovery program. Washington, DC: GAO/RCED -89-5.21 December 1988.

[14] 69 FR 8116-8119.

[15] 48 FR 39941-39943.

[16] 52 FR 46083-46087.

[17] 69 FR 8116-8119.

[18] 49 FR 1057-1058.

[19] 48 FR 39941-39943.

[20] 47 FR 2317-2319.

[21] 48 FR 46336-46337.

[22] Sparrows that were in part of dusky seaside sparrow lineage were held in captivity at one time. The notice delisting the dusky indicates that as these captive species were "hybrids" the FWS determined they were ineligible for regulation under the ESA. 55 FR 51112-51114.

[23] FWS stated, "a recent review... indicates that the Bahama swallowtail is only a sporadic resident of the United States. It is not sub-specifically distinct from the non-threatened Bahaman population of this species and does not presently qualify for listing..."49 FR 34501 34504.

[24] 61 FR 4372-4373, 2/6/1996. Cuneate bidens was determined not to be a unique species.

[25] 64 FR 33796-33800, 6/24/1999. Lloyd's hedgehog cactus was determined not to be a unique species.

[26] 58 FR 49244-49247, 9/22/1993. Subsequent data showed the Mckittrick pennyroyal to be more abundant.

[27] 43 FR 32258-32261, 7/25/1978. The Mexican duck was determined not to be a unique species.

[28] 54 FR 48749-48751, 11/27/1989. The Purple-spined hedgehog cactus was determined not to be a unique species.

[29] 48 FR 52740-52743, 11/22/1983. Subsequent data showed the Pine Barrens tree frog to be more abundant.

[30] 54 FR 37941-37943, 9/14/1989. Subsequent data showed the Rydberg milk-vetch to be more abundant.

[31] 65 FR 10420-10426, 2/28/2000. Subsequent data showed the Southeastern dismal swamp shrew to be more abundant.

[32] 58 FR 49242-49244, 9/22/1993. Subsequent data showed the spineless hedgehog cactus to be more abundant.

[33] 68 FR 56564-56567, 10/1/2003. The Truckee barberry was determined not to be a unique species.

[34] 58 FR 33562-33565, 6/18/1993. Subsequent data showed the Tumamoc globeberry to be more abundant.

[35] 65 FR 24420-24422, 4/26/2000. The coastal cutthroat trout was determined not to be a unique species.

[36] 68 FR 15803-15875, 4/1/2003. Grey wolves remain listed under the ESA; the delisting reflected revisions to the DPSs then listed.

[37] 68 FR 57829-57837, 10/7/2003. Hoover's woolly star was delisted on the basis of new information that showed listing data to be erroneous and recovery.

[38] "Threatened by similarity of appearance" is an ESA listing status whereby a species (which includes parts, products, offspring, eggs or the dead body or parts thereof (Sec.3 (8)) is not endangered but resembles an endangered species and is treated as if it were until proven otherwise. e.g., a skin claimed to be from an alligator may be treated by law enforcement officials as if it was an illegal product derived from an endangered crocodile until proven otherwise. This provision is included to aid law enforcement.

[39] The ESA of 1973 succeeded earlier laws aimed at conserving endangered species and consequently some species were listed prior to the 1973 Act. In February 1967, pursuant to the Endangered Species Preservation Act of October 15, 1966 Secretary of Interior Udall found 77 animals threatened with extinction including the alligator. Of these, 68 are listed as endangered or threatened today, two (the

alligator and Aleutian Canada goose) were delisted under the ESA on the basis of recovery, one (the Mexican duck) was delisted under the ESA on the basis of erroneous data), and three (the blue pike, longjaw cisco, and dusky seaside sparrow) were delisted under the ESA on the basis of extinction. The black toad, the Tule white-fronted goose and Montana westslope cutthroat trout were not listed under the ESA of 1973. http://endangered.fws.gov/1966listing.html.

[40] 52 FR 21059-21064, 6/4/1987, (http://ecos.fws.gov/docs/frdocs/1987/87-12806.pdf).

[41] Lewis, T.A. Searching for truth in alligator country. Natl. Wildl. September-November; 1987.

[42] USFWS. Endangered and threatened wildlife and plants. Final Rule to Remove the American Peregrine Falcon From the Federal List of Endangered and Threatened Wildlife, and To Remove the Similarity of Appearance Provision for Free-Flying Peregrines in the Conterminous United States. 64 FR 46541-46558; 1999.

[43] Burnham, William, Cade, Tom J., Lieberman, Alan J., Jenny, Peter and Heinrich, William. The Endangered Species Act and Hands-on Species Restoration, August 18, 2004.

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[48] Liebesman, Lawrence and Rofe Dentson, Endangered Species Deskbook, the Environmental Law Reporter, Washington, D.C. 20003, p13-14.

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[50] 59 FR 31094-31095, 6/16/1994.

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[52] USFWS. Endangered and threatened wildlife and plants. Removal of the Hoover's woolly- star from the list of Threatened and Endangered Wildlife. Endangered and threatened wildlife and plants. 68 Fed. Reg. 57829-57837; 2003.

[53] USFWS, Endangered and Threatened Wildlife and Plants; Removal of *Potentilla robbinsiana* (Robbins' cinquefoil) From the Federal List of Endangered and Threatened Plants, 67 FR 54968-54975; 2002.

[54] USFWS. Endangered and threatened wildlife and plants. Reclassification of the Tinian monarch from endangered to threatened status. Fed. Reg. 52: 10890-10829;1987.

[55] Under the ESA "take" of endangered species is prohibited and is defined to mean to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect or attempt to in engage in any such conduct" Sec. 3(19). Take of threatened species is not prohibited by statute but may be by regulation.

[56] 49 FR 34501-34504, 8/31/1984.

[57] 53 FR 37968-37970, 9/28/1988.

[58] 59 FR 54840-54841, 11/2/1994.

[59] 59 FR 13836, 3/23/1994.

[60] 62 FR 24345-24355, 5/5/1997.

[61] 57 FR 28014-28024, 6/23/1992.

[62] 65 FR 25867-25881, 5/4/2000.

[63] 55 FR 9129-9136, 3/12/1990.

[64] 58 FR 49870-49874, 9/23/1993.

[65] 61 FR 32356-32367, 6/24/1996.

[66] 47 FR 4204-4211, 1/28/1982.

[67] 70 FR 1190-1209, 1/6/2004.

[68] 68 FR 59337-59345, 10/15/2003.

[69] 58 FR 68476-68480, 12/27/1993.

[70] 61 FR 31054-31058, 6/19/1996.

[71] 49 FR 27510-27514, 7/5/1984.

[72] 61 FR 10693-10697, 3/15/1996.

[73] 58 FR 49935-49937, 9/24/1993.

[74] 59 FR 50852-50857, 10/6/1994.
[75] 67 FR 1662-1668, 1/14/2002.
[76] The Endangered Species Act and Hands-on Species Restoration; William Burnham, Tom J. Cade, Alan Lieberman, J. Peter Jenny and William Heinrich, August 18, 2004.
[77] 68 FR 15803-15875, 4/1/2003, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2003_register&docid=fr01ap03-12.pdf
[78] 69 FR 47212-47248, 8/4/2004, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2004_register&docid=fr04au04-15.pdf
[79] 40 FR 29863-29864, 7/16/1975.
[80] 43 FR 16343-16345, 4/18/1978.
[81] http://www.landbigfish.com/fish/fish.cfm?ID=196
[82] http://www.tucalifornia.org/lahontancutthroat.htm
[83] http://waterknowledge.colostate.edu/cutthroa.htm
[84] http://www.tucalifornia.org/paiutecutthroat.htm
[85] 49 FR 22330-22334, 5/29/1984, http://ecos.fws.gov/docs/frdocs/1984/84-14213.pdf
[86] 59 FR 59173-59177, 11/16/1994, http://ecos.fws.gov/docs/frdocs/1994/94-28326.html
[87] The low recovery potential species include 35 that are 'possibly extinct.'
[88] FWS's 2002 report includes 1,254 species. However, no data is provided for the Caribbean Population of the roseate tern.
[89] 48 FR 43098 – 43105, 9/21/83.
[90] USFWS. Report to Congress: Endangered and threatened Species Program. Washington, DC: USFWS; 2002.
[91] USFWS. Report to Congress: Endangered and threatened Species Program. Washington, DC: USFWS; 1990.
[92] USFWS, Report to Congress: Endangered and Threatened Species Program, Washington, DC 1990.
[93] 68 FR 56564-56567, 10/1/2003.
[94] 69 FR 17627-17634. This notice also responded to efforts by the Southern Appalachian Biodiversity Project to compel designation of critical habitat for Eggert's sunflower that resulted in a Court Order requiring USFWS to reconsider its earlier determination that designation for Eggert's Sunflower was "not prudent." In this notice USFWS again determines that that it is "not prudent" to designate critical habitat but does so this time on the grounds that the species does not warrant listing under the ESA. Presumably, by prevailing before court the organization may have been entitled to litigation costs.
[95] 68 FR 27961 27961, 5/22/2003.
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[97] USFWS. June 4, 1993, 58 FR 3240.
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[145] http://ecos.fws.gov/tess_public/TESSWebpageForeign?listings=0. This number excludes threatened dual status & experimental populations.
[146] Sec 2 (b) Purposes. The purposes also include taking "such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section."
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[172] USFWS. 1999. Santa Cruz long-toed Salamander draft revised recovery plan. USFWS, Portland, Oregon.
[173] GAO, Endangered Species, Fish and Wildlife Service Generally Focuses Recovery Funding on High Priority Species, but Needs to Periodically Assess its Funding Decisions, GAO-0 -211, April 2005, p. 3.
[174] Not all of the BPA's reported ESA expenditures (lost power generation revenue and power purchases or other ESA expenditures) are passed on to its ratepayers. BPA reduces the cost passed on by taking credits under Section 4(h)(10)(c) of the Regional Act. These credits reflect the portion (22.3%) of power purchases and other expenditures related to endangered species that should be attributed to the other authorized purposes of the hydroelectric projects. Other authorized purposes are navigation, recreation, irrigation and flood control. The portion of the dams' costs allocated to the power purpose is 77.7% overall for the system and ranges from 1.4% to 100% for individual dams. For example, BPA took credits in 2001 that reduced reported ESA expenditures from almost $1.7 billion to $1.1 billion. The latter costs were passed on to customers. BPA roughly estimates that over 20% of the rate paid by preferred customers is related to ESA expenditures.
[175] 48 FR 43098-43105.
[176] 48 FR 43098-43105.
[177] Sec.4 (f)1(A).
[178] A national survey by Professor Don Coursey at the University of Illinois at Chicago (*The Revealed Demand for a Public Good: Evidence from Endangered and Threatened Species*, January 1994), demonstrated significant difference in the value respondents placed on different animal species. At the top of the list "of mean importance" was the bald eagle followed by the whooping crane, green sea turtle, leatherback sea turtle, southern sea otter, grizzly bear, artic peregrine falcon, Hawaiian hawk, key deer and Eastern cougar. At the bottom of the 246 species included in the survey were the Amargosa vole, Marianas fruit bat, Stephans' kangaroo rat, Tooth Cave pseudoscorpion, painted snake coil forest snail, Bee Creek cave harvestman, Tipton kangaroo rat, Tooth Cave spider and lastly, the Krestchmar Cave mold beetle.
[179] 48 FR 43098, September 21, 1983 & 48 FR 51985, November 15, 1983 (Correction).
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[181] U.S. Fish & Wildlife Service (2003) Final environmental assessment designation of critical habitat for Preble's meadow jumping mouse. Appendix 10.5 Addendum to economic analysis of critical habitat designation for the Preble's meadow jumping mouse. (Ecological Services Field Office, Cheyenne, Wyoming).
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[189] Draft Economic Analysis of Conservation Actions to Protect Arroyo Toad Release, USFWS, February 14, 2005.
[190] Issue Paper: Economic Impact of the Designation of Critical Habitat for the Southwestern Willow Flycatcher on the City of Phoenix Water Supply. Submitted to: Industrial Economics for The U.S. Fish and Wildlife Service By the City of Phoenix, September 14, 2004.
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[194] Liebesman, Lawrence and Rofe Dentson, Endangered Species Deskbook, the Environmental Law Reporter, Washington, D.C. 20003, p39.
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[198] 68 FR46683-467326, 6/8/2003.
[199] *Gifford Pinchot Task Force v. USFWS*, 378 F.3d 1059, 1069 (9th Cir. 2004).
[200] "The Current FWS Listing Program – Approximate Range Of Average Costs Of Rulemakings," USFWS, NCTC ES Listing Course, Revised February 14, 2005. USFWS staff report that GPO does not accept digitized maps for the printing of Critical Habitat notices in the Federal Register. This cost difference between type and maps (line art) may indicate that GPO relies upon obsolescent technology.
[201] 69 FR 48570-48649, 8/10/2004.
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