

ENDANGERED SPECIES ACT AMENDMENTS

DECEMBER 11, 1979.—Ordered to be printed

Mr. MURPHY of New York, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 1143]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 1143) to extend the authorization for appropriations for the Endangered Species Act of 1973, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

That section 2(a)(5) of the Endangered Species Act of 1973 (16 U.S.C. 1531(a)(5)) is amended by striking out "fish and wildlife." and inserting in lieu thereof "fish, wildlife, and plants."

SEC. 2. Section 3(11) of the Endangered Species Act of 1973 (16 U.S.C. 1532(11)) is amended by striking out "(A)" and all that follows thereafter and inserting in lieu thereof "violate section 2(a)(2)."

SEC. 3. Section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533) is amended—

(1) by amending subsection (b)(1) by striking out "him" and inserting in lieu thereof the following: "him after conducting a review of the status of the species";

(2) by amending subsection (f)(2)(B)(i) to read as follows:

"(i) not less than 60 days before the effective date of the regulation, shall publish—

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

(II) if the proposed regulation specifies any critical habitat, general notice of the regulation (including a summary of the text, and a map of the proposed critical habitat) in a newspaper of general circulation within or adjacent to such habitat;

(3) by amending subsection (f)(2)(B)(iv)(II) by striking out "if requested," and inserting in lieu thereof "if requested within 15 days after the date on which the public meeting is conducted,";

(4) by amending that part of subsection (f)(2)(C) which precedes clause (i) by inserting ", subsection (b)(4) of this section," immediately after "Neither subparagraph (A) or (B) of this paragraph";

(5) by amending subsection (f)(2)(C)(ii)—

(A) by striking out "fish or wildlife," and inserting in lieu thereof "fish or wildlife or plants,";

(B) by striking out "fish and wildlife," and inserting in lieu thereof "fish, wildlife, and plants,";

(C) by striking out "120-day period" each place it appears therein and inserting in lieu thereof "240-day period"; and

(D) by adding at the end thereof the following new sentence: "If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best scientific and commercial data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.;" and

(6) by adding at the end thereof the following new subsection:

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

"(1) procedures for recording the receipt and the disposition of petitions submitted under subsection (c)(2) 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 for listing; and

"(4) a system for developing and implementing, on a priority basis, recovery plans under subsection (g) of this section.

The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection."

SEC. 4. Section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536) is amended—

(1) by amending subsection (a)—

(A) by striking out "(a) CONSULTATION.—" and inserting in lieu thereof "(a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS.—(1)";

(B) by striking out the third sentence thereof; and

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

"(2) 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 re-

ferred to as an 'agency action') 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.

(3) 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. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).";

(2) by amending the last sentence of subsection (b) to read as follows: "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 the permit or license applicant in implementing the agency action.;"

(3) by amending each of subsections (b), (c), (d), (e)(2), (f), (g)(1) and (5), (h)(1), and (m) by striking out "subsection (a)" wherever it appears therein and inserting in lieu thereof "subsection (a)(2)";

(4) by further amending subsection (c)—

(A) by inserting "(1)" immediately after "BIOLOGICAL ASSESSMENT.—"; and

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

"(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.;"

(5) by striking out "avoid jeopardizing" and all that follows thereafter in subsection (d) and inserting in lieu thereof "not violate subsection (a)(2).";

(6) by further amending subsection (g)(1) by striking out "may jeopardize" and all that follows thereafter in the first sentence thereof and inserting in lieu thereof "would violate subsection (a)(2).";

(7) by amending subsection (g)(2)(A) by striking out "process." and inserting in lieu thereof "process; or, in the case of any agency action involving a permit or license applicant, not later than 90 days after the date on which the Federal agency concerned takes final agency action, for purposes of chapter 7 of title 5, United States Code, with respect to the issuance of the permit or license.;"

(8) by amending subsection (g)(3) by redesignating subparagraph (B) as subparagraph (C), and by inserting immediately after subparagraph (A) the following new subparagraph:

"(B) If biological opinions of both the Secretary of the Interior and the Secretary of Commerce indicate that an agency action would violate subsection (a)(2), such Secretaries shall jointly convene a review board to consider any application for exemption filed with respect to such agency action."

(9) by further amending subsection (g)(5)—

(A) by redesignating clauses (1) and (2) as clauses (A) and (B), respectively,

(B) by inserting "the Federal agency concerned and" immediately before "such exemption applicant" in clause (B) (as so redesignated),

(C) by redesignating subclauses (A), (B), and (C) as subclauses (i), (ii), and (iii), respectively,

(D) by striking out "will avoid jeopardizing" and all that follows thereafter in subclause (i) (as so redesignated) and inserting in lieu thereof "would not violate subsection (a)(2)," and

(E) by striking out "exemption applicant" and all that follows thereafter in the last sentence and inserting in lieu thereof "Federal agency concerned or the exemption applicant has not met its respective requirements under subclause (i), (ii), or (iii) shall be considered final agency action for purposes of chapter 7 of title 5 of the United States Code."

(10) by amending subsection (g)(6) by striking out "subparagraphs (A), (B), and (C)" and inserting in lieu thereof "subclauses (i), (ii), and (iii)";

(11) by amending subsection (h)(2) to read as follows:

"(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." and

(12) by amending the first sentence of subsection (q) to read as follows: "There are authorized to be appropriated to the Secretary to assist review boards and the Committee in carrying out their functions under subsections (e), (f), (g), and (h) of this section not to exceed \$600,000 for each of fiscal years 1979, 1980, 1981, and 1982."

SEC. 5. Section 8 of the Endangered Species Act of 1973 (16 U.S.C. 1537) is amended—

(1) by inserting "and plants" immediately after "fish or wildlife" in subsection (b)(1);

(2) by inserting "or plants" immediately after "fish or wildlife" each place it appears in subsection (b)(3);

(3) by inserting "or plants" immediately after "fish or wildlife" in subsection (c)(1); and

(4) by striking out subsection (e).

SEC. 6. (a) The Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) is further amended—

(1) by adding immediately after section 8 the following new section:

"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.

"(b) MANAGEMENT AUTHORITY FUNCTIONS.—The Secretary shall do all things necessary and appropriate to carry out the functions of the Management Authority under the Convention.

"(c) SCIENTIFIC AUTHORITY FUNCTIONS.—The Secretary shall do all things necessary and appropriate to carry out the functions of the Scientific Authority under the Convention.

"(d) INTERNATIONAL CONVENTION ADVISORY COMMISSION.—(1) There is hereby established the International Convention Advisory Commission (hereinafter in this section referred to as the 'Commission').

"(2) The Commission shall be composed of the following members:

"(A) One member appointed by each of the following Federal officers from his respective agency:

"(i) The Secretary.

"(ii) The Secretary of Agriculture.

"(iii) The Secretary of Commerce.

"(iv) The Director of the National Science Foundation.

"(v) The Chairman of the Council on Environmental Quality.

"(B) One member appointed by the Secretary from among-officers and employees of the State agencies having fish and wildlife conservation and management responsibilities.

"(C) The Secretary of the Smithsonian Institution is invited to appoint a member.

"(3)(A) Individuals who are appointed as members of the Commission under paragraph (2) must be scientifically qualified.

"(B) The term of office of a member of the Commission appointed under paragraph (2)(B) is two years and an individual may be appointed under such paragraph for any number of terms; except that an individual may not be appointed under that paragraph for a term that would be a third consecutive term for that individual under that paragraph.

"(C) While away from his home or regular place of business in the performance of services for the Commission, a member appointed under paragraph (2)(B) or (C) shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as the expenses authorized by section 5703(b) of title 5, United States Code, for persons in the Government service employed intermittently.

"(D) Members of the Commission who are full-time officers or employees of the United States shall receive no additional compensation on account of their service on the Commission.

"(4)(A) The Commission shall elect a chairman from among its members. The term of office of the chairman is one year.

"(B) No recommendation referred to in paragraph (5) shall be deemed to be a recommendation of the Commission unless a majority of the members of the Commission vote for that recommendation.

"(5) The Commission shall make recommendations to the Secretary or his designee on all matters pertaining to the responsibilities of the Scientific Authority under the terms of the Convention. The Commission shall include with any such recommendation any written dissenting view made by any member.

"(6) In the discharge of its responsibilities, the Commission shall, to the extent practicable, ascertain the views of, and utilize the expertise of, the governmental and nongovernmental scientific communities, State agencies responsible for the conservation of wild fauna or flora, humane groups, zoological and botanical institutions, recreational and commercial interests, the conservation community and others as appropriate.

"(7) In any case in which the Scientific Authority decides not to accept a recommendation made by the Commission under paragraph (5), the Scientific Authority shall provide to the Commission a written explanation of the reasons for that decision and shall publish the explanation in the Federal Register.

"(8)(A) The Chairman of the Commission, with the concurrence of the Commission, shall appoint an Executive Secretary for the Commission. The Executive Secretary shall carry out such duties and functions as shall be prescribed by the Commission, shall be appointed subject to the provisions of title 5, United States Code, governing appointments in the competitive service, and shall be paid in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates.

"(B) The Secretary shall provide the necessary staff and administrative support for the Commission.

"(e) **WILDLIFE PRESERVATION IN WESTERN HEMISPHERE.**—The President shall designate those agencies of the Federal Government that 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."; and

(2) by amending the table of contents by inserting immediately after the section title for section 8 the following:

"Sec. 8A. Convention implementation."

(b) Until such time as the Chairman, Members, and Executive Secretary of the International Convention Advisory Commission are appointed, but not later than 90 days after the date of the enactment of this Act, the functions of the Commission shall be carried out by the Endangered Species Scientific Authority as established by

Executive Order Numbered 11911, with staff and administrative support being provided by the Secretary of the Interior as set forth in that Executive order.

SEC. 7. Section 10(f) of the Endangered Species Act of 1973 (16 U.S.C. 1539(f)) is amended—

(1) in paragraph (4), by inserting "unless such exemption is renewed under paragraph (8)" after "certificate" in subparagraph (C); and

(2) by adding at the end thereof the following new paragraphs:

"(8)(A) Any person to whom a certificate of exemption has been issued under paragraph (4) of this subsection may apply to the Secretary for a renewal of such exemption for a period not to exceed three years beginning on the expiration date of such certificate. Such application shall be made in the same manner as the application for exemption was made under paragraph (3), but without regard to subparagraph (A) of such paragraph.

"(B) If the Secretary approves any application for renewal of an exemption under this paragraph, he shall issue to the applicant a certificate of renewal of such exemption which shall provide that all terms, conditions, prohibitions, and other regulations made applicable by the original certificate shall remain in effect during the period of the renewal.

"(C) No exemption or renewal of such exemption made under this subsection shall have force and effect after the expiration date of the certificate of renewal of such exemption issued under this paragraph."

SEC. 8. Section 15 of the Endangered Species Act of 1973 (16 U.S.C. 1542) is amended to read as follows:

"AUTHORIZATION OF APPROPRIATIONS

"Sec. 15. Except as authorized in sections 6 and 7 of this Act, there are authorized to be appropriated—

"(1) not to exceed \$23,000,000 for each of fiscal years 1979 and 1980, not to exceed \$25,000,000 for fiscal year 1981, and not to exceed \$27,000,000 for fiscal year 1982 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 \$2,500,000 for each of fiscal years 1979 and 1980, not to exceed \$3,000,000 for fiscal year 1981, and not to exceed \$3,500,000 for fiscal year 1982 to enable the Department of Commerce to carry out such functions and responsibilities as it may have been given under this Act; and

"(3) not to exceed \$1,500,000 for fiscal year 1980, not to exceed \$1,750,000 for fiscal year 1981, and not to exceed \$1,850,000 for fiscal year 1982 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 terrestrial plants."

And the House agree to the same.

That the Senate recede from its disagreement to the amendment of the House to the title of the bill and agree to the same.

JOHN M. MURPHY,
JOHN BREAUX,
JOHN D. DINGELL,
DAVID R. BOWEN,
PAUL N. McCLOSKEY, Jr.
EDWIN B. FORSYTHE,

Managers on the Part of the House.

JOHN C. CULVER,
EDMUND S. MUSKIE,
GARY HART,
JOHN H. CHAFEE,
ROBERT T. STAFFORD,

Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 1143) to extend the authorization for appropriations for the Endangered Species Act of 1973, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment to the text of the bill struck out all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment which is a substitute for the Senate bill and the House amendment. The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

SECTION-BY-SECTION ANALYSIS

SECTION 1

Section 1 of the conference report adds "plants" to section 2(a)(5) of the Act to the Congressional finding that to encourage endangered species conservation programs is a key to meeting the Nation's international commitments and to better safeguarding the Nation's heritage in fish, wildlife and plants.

SECTION 2

Section 2 of the conference report adopts the House amendment to Section 3(11) of the Act. This provision conforms the definition of "irresolvable conflict" to the substantive standard of Section 7(a)(2) so that the language of the Act is consistent throughout.

SECTION 3

Section 3(1)

Section 3(1) amends Section 4(b)(1) of the Act to require the Secretary to conduct a review of the status of the species before proposing to list the species as endangered or threatened. Section 4(c)(2) of the Act already requires the Secretary to conduct a "status review" of species identified in petitions to list species. During testimony in oversight hearings, and in its written report entitled "Endangered Species—A Controversial Issue Needing Resolution," the General Accounting Office (GAO) criticized the Department of the Interior for failing to adequately review the status of species before proposing them for the list. The GAO argued in

several instances, that if the Fish and Wildlife Service had conducted status reviews to obtain adequate information on proposed species, including the development of the latest and best available scientific data as required by the Act, the species may never have been proposed in the first place.

Section 3(1) would require status reviews to determine whether enough scientific and biological data exists to warrant proposing a species for listing as endangered or threatened. These reviews may include, as appropriate, communication with experts in the field such as: regional, area and field staff, university professors in the affected area, professional organizations and journals, local citizens, state agencies, as well as concerned Federal agencies, such as the Corps of Engineers, the U.S. Geological Survey, or the Environmental Protection Agency.

Section 3(2)

Section 3(2) amends the public notice provisions of the Act to require the publication of a summary of the text of the regulation in local newspapers, rather than the complete text. The Secretary would be required to include a map of the proposed critical habitat in the newspaper notice. The maps of proposed critical habitats currently published by the Secretary in the Federal Register are sufficient to comply with this provision.

Although the conferees believe that it is unnecessary to publish the complete text of critical habitat proposals in local newspapers to give adequate notice to affected communities, the conferees believe that the summary should include sufficient detail to inform local residents of the major elements of the listing proposal. In most cases these elements will include the biological justification for the listing, the justification for the critical habitat designation, and a brief description of the activities that may adversely modify the critical habitat, or may be impacted by the designation of such habitat.

Section 3(3)

Section 3(3) amends Section 4(D)(2)(B)(iv)(II) of the Act to require public meetings and hearings on critical habitat proposals to be held separately. Individuals requesting a public hearing would have to communicate their request to the Secretary within 15 days after the date on which the public meeting was conducted.

The Congress enacted subsection (F)(2)(B)(iv)(II) last year to improve the flow of information on endangered species proposals to the local communities that will be most impacted by the listing and critical habitat designation. A public meeting is intended to be an informal exchange of information on the regulatory proposal. The conferees do not expect or require the Secretary to provide a court reporter at these meetings. The purpose of the public meeting is essentially to provide an opportunity for local citizens to engage in a colloquy with Departmental representatives about the reasons for the listing and critical habitat designation and the potential impact of the listing on activities in the area. The meeting should also provide an opportunity for the Departmental representatives to become more familiar with the concerns of the local community.

The purpose of a public hearing, if requested, is to provide a more formal opportunity for local residents to comment on the listing and designation proposal, after they have had an opportunity to become familiar with the proposal in the public meeting. It is

intended that a verbatim transcript of such hearing be made and be available upon request.

The conferees recognize that there will be added costs as a result of the bifurcation of the meeting and hearings. The conferees do not intend to require the Secretary to republish the substance of the regulatory proposal in a local newspaper prior to the public hearing. Obviously, the Department will have to provide adequate notice of the time and place of the public hearing by publication in the Federal Register and a newspaper of general circulation in the local area if such a hearing is requested.

Section 3(4)

Section 3(4) amends the emergency regulation provision of the Act to clarify that the Secretary may list a species and designate critical habitat under this provision without first complying with Section 4(b)(4) of the Act. Section 4(b)(4) requires the Secretary to consider the economic and other relevant impacts of designating an area as critical habitat. This amendment does not absolve the Secretary from complying with Section 4(b)(4) or any other provision of the Act before the species is listed under Section 4(a) of the Act.

Section 3(5)

Section 3(5) amends the emergency listing provision to include plant species in addition to fish and wildlife. It also extends the emergency time period to 240 days. Currently, actions under this section are limited to 120 days. The conferees recognize that the 1978 Amendments added substantially to the procedural requirements of the Act. Since all of the requirements of the Act must be complied with prior to listing under Section 4(a), the time during which an emergency regulation can remain in effect must be significantly increased.

Section 3(6)

Section 3(6) requires the Secretary to establish agency guidelines to insure that the purposes of Section 4 of the Act are achieved efficiently and effectively. The GAO report on the Endangered Species Act criticized the Department of Interior for failing to formulate and publish guidelines and procedures to govern the implementation and administration of the Act. The GAO noted that petitions filed with the Department had been misplaced and that the Department failed to adequately implement any of the many listing and recovery priority systems. The conferees believe that the Department is well on its way toward resolving these problems. This amendment is intended to insure that these procedures are adequately developed and implemented. The House amendment required the development of these procedures by regulation. The conferees believe that the formal regulatory process may inhibit the effective implementation of necessary amendments to these procedures. The conference report merely requires that the procedures be developed by guideline. It does require, however, the Secretary to make the proposed procedures public and to provide an opportunity for comment on them.

Although Section 3(6) requires the development of a listing and recovery priority system, it does not require the listing of species and the implementation of recovery efforts to be suspended pending the development of the guidelines. The conferees note that these systems have already been developed by the Department of

the Interior for internal guidance. The Secretary is merely required to publish the details of the systems and solicit comment on them.

SECTION 4

Section 4(1)

The conference report adopts the language of the House amendment to Section 7(a) pertaining to consultation by Federal agencies with the Fish and Wildlife Service and the National Marine Fisheries Service. The amendment, which would require all Federal agencies to ensure that their actions are not likely to jeopardize endangered or threatened species or result in the adverse modification of critical habitat, brings the language of the statute into conformity with existing agency practice, and judicial decisions, such as the opinion in *National Wildlife Federation v. Coleman*.

Section 7(b) of the Act requires the Fish and Wildlife Service and the National Marine Fisheries Service to render biological opinions which advise whether or not proposed agency actions would violate Section 7(a)(2). Courts have given substantial weight to these biological opinions as evidence of an agency's compliance with Section 7(a). The amendment would not alter this state of the law or lessen in any way an agency's obligation under Section 7(a)(2).

As currently written, however, the law could be interpreted to force the Fish and Wildlife Service and the National Marine Fisheries Service to issue negative biological opinions whenever the action agency cannot guarantee with certainty that the agency action will not jeopardize the continued existence of the listed species or adversely modify its critical habitat. The amendment will permit the wildlife agencies to frame their Section 7(b) opinions on the best evidence that is available or can be developed during consultation. If the biological opinion is rendered on the basis of inadequate information then the Federal agency has a continuing obligation to make a reasonable effort to develop that information.

This language continues to give the benefit of the doubt to the species, and it would continue to place the burden on the action agency to demonstrate to the consulting agency that its action will not violate Section 7(a)(2). Furthermore, the language will not absolve Federal agencies from the responsibility of cooperating with the wildlife agencies in developing adequate information upon which to base a biological opinion. If a Federal agency proceeds with the action in the face of inadequate knowledge or information, the agency does so with the risk that it has not satisfied the standard of Section 7(a)(2) and that new information might reveal that the agency has not satisfied the standard of Section 7(a)(2).

The conferees added a new paragraph (3) to Section 7(a). This provision is nearly identical to the House language and requires Federal agencies to confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed as endangered or threatened. This language grew out of the recommendations of the General Accounting Office. The GAO suggested that Federal agencies be required to consult on proposed species in addition to those that are formally listed as endangered or threatened.

The intent of the provision is to require Federal agencies to begin informal discussions with the wildlife agencies of the Federal Government about the possible adverse impact of agency actions on proposed species. The informal discussions can be initiated by either the wildlife agency or the action agency.

The new provision, Section 7(a)(3), does not require Federal agencies to enter into formal Section 7 consultation under subsection (a)(1) or (2). Nor does subsection (a)(3) require Federal agencies or permit or license applicants to refrain from making irreversible or irretrievable commitments of resources which have the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives to the agency action. Section 7(d) of the Act does place a limitation on the commitment of resources after the initiation of formal Section 7(a)(2) consultation on listed species, but not species proposed for listing.

The conferees note that the purpose of a listing proposal is to determine whether a species is endangered or threatened and should be listed as such. The protections of Section 7 should not apply until a species has been formally listed. The conferees also note that the Supreme Court made it abundantly clear in *Tennessee Valley Authority v. Hill* that the prohibitions of Section 7 apply regardless of the state of completion of the project. 11 ERC 1705, 1717 (1978). Obviously, Federal agencies irreversibly committing resources and foreclosing alternatives to an action that is likely to jeopardize a proposed species do so with the risk that the species will eventually be formally listed and the prohibitions of Section 7 will become applicable. The conferees do not believe that any Federal agency or permittee should make any irreversible or irretrievable commitments of resources for the purpose or with the intent of foreclosing otherwise reasonable alternatives or in order to secure an exemption pursuant to Section 7(h).

Section 4(2)

Section 4(2) makes a technical change in the language of Section 7(b) of the Act to insure that the language of the Act is consistent throughout.

Section 4(3)

Section 4(3) adopts the provisions of the House amendment which make technical changes in a variety of sections of the Act to insure that the language of the Act is consistent throughout.

Section 4(4)

Section 4(4) adopts provisions appearing in both the Senate bill and the House amendment. This section authorizes all persons with standing to file for an exemption to conduct a biological assessment. The conferees adopted the House language which requires the biological assessments conducted under this section to be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

The existing law requires Federal agencies to conduct biological assessments on major Federal actions initiated after November 10, 1978 and designed primarily to result in the building or erection of dams, buildings, pipelines and the like. The change proposed by Section 4(4) is significant because, for the first time, it authorizes all exemption applicants to receive a permanent exemption. Section 7(h)(2) of the Act identifies the completion of a biological as-

assessment as a prerequisite to receiving a permanent exemption. Biological assessments are designed to assist Federal agencies in determining whether Section 7(a)(2) consultation should be initiated by identifying endangered or threatened species that may be present in the area affected by their proposed project and by identifying the impacts of those projects on such species. Because the exemption may be permanent, even as to those species not identified in a biological assessment, it is important that the assessment be as complete and thorough as possible so that future conflicts can be avoided. Subjecting privately conducted assessments to the supervision and scrutiny of the Federal agency and the Secretary will assist the development of adequate assessments.

Section 4(5)

Section 4(5) makes a technical change in Section 7(d) of the Act to insure that the language of the statute is consistent throughout.

Section 4(6)

Section 4(6) amends Section 7(g)(1) of the Act to conform the language of subsection (g)(1) to the substantive standard of Section 7(a)(2).

Section 4(7)

Section 4(7) of the conference report amends Section 7(g)(2)(A) of the Act to provide that, in the case of an action involving a permit or license applicant, an application for exemption may not be filed until after final agency action for purposes of chapter 7 of title 5 of the United States Code (5 U.S.C. 701-706).

The Senate bill and the House amendment contained essentially similar provisions intended to clarify provisions of existing law with respect to the timeliness of an exemption application where a permit or license application is involved. The conferees adopted the House modification.

The term "permit or license applicant" is defined in the Act to mean any person whose permit or license application has been denied primarily because of the application of Section 7(a) to such agency action. Section 7(g)(2)(A) of the Act currently requires applications to be filed not later than 90 days after the completion of the consultation process. The existing language of the Act has resulted in confusion in those instances when a biological opinion has been issued although the Federal agency has not taken final action with respect to the permit at issue. The conference report clarifies the intent of the 1978 Amendments by providing that applications for exemptions in these circumstances should not be filed until after final agency action on the permit or license application at issue.

The exemption process was designed to resolve endangered species conflicts after other administrative remedies, including consultation have been exhausted. It makes no sense to initiate an exemption process before it has been determined that there is a need for an exemption in the first place. This provision insures exemption applications will be filed, in cases involving permit or license applicants, when the application is ripe for review.

The term "final agency action" is used in the same sense as it is employed in the judicial review provisions of the Administrative Procedure Act (5 U.S.C. 701-706). Thus, an application for an ex-

emption can be filed at the same time that the action becomes judicially reviewable under 5 U.S.C. 704.

The conferees retained the exemption filing period provided in existing law for agency actions other than those involving a permit or license applicant. Thus, if a Federal agency decides that it cannot comply with the requirements of Section 7 after consultation with the wildlife agency, it can file for an exemption within 90 days of that decision. The conferees retained this provision of the existing law because of the realization that there may be many agency actions not involving a "permit or license applicant". It may be difficult in these instances to determine when the final agency action occurred. The Federal agency should be permitted to file for an exemption only after it has, however, complete consultation with the wildlife agency on the action and decided that it cannot proceed in light of the requirements of Section 7(a)(2).

The conferees note that the definition of "agency action" in the Act could lead to multiple exemptions applications for the same project. Federal agencies and permittees should attempt to consolidate all applications which involve substantially similar factual and legal issues.

Section 4(8)

Section 4(8) resolves the problem posed by the division of responsibility over marine and terrestrial species by the Departments of Interior and Commerce. This section requires the Secretaries of Interior and Commerce to jointly convene a review board in those instances where both Departments have issued negative biological opinions for the same agency action.

Section 4(9)

Section 4(9) adopts the House language which clarifies the application of the threshold requirements of Section 7(g)(5) of the Act to the Federal agency and the exemption applicant. Section 7(g)(5) provides that the review board shall make a determination whether the exemption application has (i) carried out its consultation responsibilities, (ii) conducted any biological assessment required of it, and (iii) refrained from making commitments of resources prohibited by Section 7(d). Section 4(9) of the conference report makes it clear that these requirements apply to the Federal agency and the exemption applicant. This is intended to insure that all of the threshold requirements are complied with regardless of the identity of the exemption applicant. The consultation requirement of Section 7(a)(2), for example, only applies to Federal agencies. Federal agencies should not be permitted to avoid their consultation responsibilities by having a permittee apply for an exemption.

The conferees note that the language of Section 4(9) is not intended to add responsibilities to exemption applicants not already required by the statute. For example, the biological assessment requirement of Section 7(c) applies only to Federal agencies. Federal permittees should not conduct a biological assessment, although a biological assessment is required of a permittee or licensee in order to receive a permanent exemption under Section 7(h)(2).

Section 4(10)

Section 4(10) makes a technical amendment to Section 7(g)(6).

Section 4(11)

Section 4(11) amends Section 7(h)(2) of the Act to provide that exemptions granted by the Endangered Species Committee shall be permanent 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 on the agency action.

The section provides that the exemption will be permanent unless the Secretary finds that the exemption would result in the extinction of a species not the subject of consultation or not identified in any biological assessment, and the Endangered Species Committee determines within 60 days that the exemption should not be permanent. The provision requires the Committee to meet within 30 days of the Secretarial finding.

Section 4(11) is intended to give some certainty and predictability to those exemption applicants that have succeeded in receiving an exemption through the exemption process, if the applicant has conducted a biological assessment under the terms of Section 7(c). This section does allow, however, for a reconsideration of the permanent exemption in the limited instance where the Secretary finds that the exemption will result in the extinction of species that were not identified in a biological assessment or not identified during consultation. Even in this limited instance, however, the Committee must affirmatively vote not to continue the exemption.

The Conferees recognize that this provision raises the possibility that an exemption granted for an agency action because of a conflict with one species, will also apply to the same agency action even if a subsequent species is discovered. The conferees note, however, that the language of Section 7(a)(2) will require consultation on any listed species identified in the biological assessment until the time that the Endangered Species Committee grants the agency action an exemption from the requirements of Section 7.

Section 4(12)

Section 4(12) authorizes to be appropriated \$600,000 to the Secretary to assist the review boards and the Endangered Species Committee in carrying out their functions during fiscal years 1980, 1981 and 1982.

SECTION 5

Section 5 adopts the House language which authorizes the Secretary to encourage foreign nations to develop programs for the conservation of endangered and threatened plants. This section also permits the Secretary to assign Departmental personnel for the purpose of cooperating with foreign countries and international organizations in the promotion of the conservation of plant species. The conferees recognize that the conservation of endangered and threatened species worldwide often requires the United States to share its expertise in this area with other governments and institutions. The conferees intend this provision to authorize the Secretary to share staff, at his discretion, with such organizations as the International Union for the Conservation of Nature and Natural Resources.

Section 6 completely repeals Section 8(e) of the Act and replaces it with a new Section 8A. This Section establishes the Secretary of the Interior as the Scientific Authority and the Management Authority for purposes of the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The Secretary is required to carry out these functions through the United States Fish and Wildlife Service.

Under the existing Act, and Executive Order 11911, the Secretary is designated the Management Authority and a seven member inter-agency committee is designated the existing Scientific Authority. Section 6 removes the functions of the Scientific Authority and places them with the Secretary of the Interior acting through the Fish and Wildlife Service. The conferees believe that this arrangement will facilitate the coordinated implementation of the Endangered Species Convention without weakening the United States' important role in the conservation of endangered species worldwide.

Section 6 also establishes an independent advisory commission composed of the following:

(A) One member appointed by each of the following Federal Officers:

- (i) The Secretary of the Interior,
- (ii) The Secretary of Agriculture,
- (iii) The Secretary of Commerce,
- (iv) The Director of the National Science Foundation,
- and
- (v) The Chairman of the Council on Environmental Quality.

(B) One member appointed by the Secretary from among officers and employees of State fish and wildlife agencies; and

(C) The Secretary of the Smithsonian Institution is invited to appoint a member.

With the exception of the State fish and wildlife representative, the agencies represented on the advisory commission are identical to the agencies represented on the existing Endangered Species Scientific Authority (ESSA). The State fish and game official essentially replaces the representative of the Department of Health, Education and Welfare on the existing ESSA. The heads of the various agencies represented on the advisory commission are free to appoint the individual now representing them on the ESSA to the Commission, although they are not required to do so.

The conferees established an independent commission to insure that the Scientific Authority receives unbiased scientific advice on those matters within the responsibility of the Scientific Authority from a multi-disciplined group. This should insure that the Scientific Authority receives scientific advice from a wide spectrum of public and private individuals with biological expertise.

Although Section 6 establishes an independent advisory commission, the Section requires the Secretary to carry out his Scientific Authority functions through the Fish and Wildlife Service. Under the existing law, the Secretary carries out his Management Authority responsibilities through the Wildlife Permit Office of the Fish and Wildlife Service. This section requires the Secretary to es-

establish a similar arrangement within the Fish and Wildlife Service for his Scientific Authority responsibilities. The Secretary of the Interior retains the ultimate responsibility to make those decisions required of the Scientific Authority and the Management Authority by the International Convention.

The Section requires the Secretary to provide the necessary staff and administrative support for the Commission. The conferees anticipate that the staff requirements of the Commission should parallel the requirements of the existing ESSA. The conferees suggest that the Commission advise the Secretary on the staff and funding needs of the Commission.

The conferees want to emphasize that the unit of the Fish and Wildlife Service assigned to carry out the responsibilities of the Scientific Authority should not share or exchange staff with the Commission. The purpose of the Commission is to provide independent scientific advice to the Scientific Authority. This purpose would be frustrated by commingling the Commission staff with those of the Fish and Wildlife Service unit assigned by the Secretary to carry out the functions of the Scientific Authority.

Section 6 requires the Commission to make recommendations to the Secretary or his designee on all matters pertaining to the responsibilities of the Scientific Authority under the terms of the Convention. If the Scientific Authority disagrees with any recommendation made by the Commission, he is required to provide the Commission with a written explanation of the reasons for his decision. The Secretary's explanation, along with any findings required by the Convention, should be published in the Federal Register. The Secretary's explanation should be sufficiently detailed to adequately inform the Commission of the nature of the evidence relied on by the Secretary in reaching his decision. The Secretary should provide an opportunity for public comment on all Management Authority and Scientific Authority decisions.

Section 6 designates the Secretary of the Interior as the Management Authority for purposes of the Convention. The conferees note that the Endangered Species Act of 1973 and Reorganization Plan Number 4 of 1970 vests jurisdiction in certain marine species in the Secretary of Commerce. The conferees believe that on any Management Authority action involving these marine species the Secretary should consult with the National Oceanic and Atmospheric Administration within the Department of Commerce and implement the NOAA recommendations in this area.

SECTION 7

Section 7 adopts the House amendment to Section 10(C) of the Act. This amendment will permit the extension of the so-called "scrimshaw" exemption for an additional three years. It will permit the owners of certain whale parts and products which were held in stock prior to 1973 to continue trading such products for an additional three years. The conferees wish to emphasize that this represents the last extension of Section 10(C) of the Act. Three years ago, the holders of these products, primarily scrimshaw artists in New England and the Pacific Northwest, represented to the Congress that they would be able to dispose of their pre-Act holdings within three years. They were wrong. This provision will allow

these individuals an additional three years, but no longer, to dispose of these products.

SECTION 8

Section 8 adopts the authorization levels for the Departments of the Interior and Commerce recommended by the Senate. These authorization levels will permit a much-needed expansion of the endangered species program budget in the 1981 and 1982 fiscal years.

Section 8 adopts the House amendment authorizing funds to the Department of Agriculture to carry out their functions and responsibilities with respect to the enforcement of the Act and the Convention which pertain to the importation or exportation of terrestrial plants. The evidence presented to the Congress suggests that the Department of Agriculture has failed to adequately regulate trade in endangered and threatened plants because of an absence of sufficient and qualified enforcement personnel. The conferees note that this authorization is limited to the Department of Agriculture's responsibilities for the enforcement of the importation and exportation of plants. It is not intended to restrict the level of funding available to the Department of Agriculture to carry out habitat acquisitions and other programs for the conservation of endangered and threatened species.

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