

NOTICE OF OFFICE OF MANAGEMENT AND BUDGET ACTION

Date 10/05/2010

Department of Commerce  
National Oceanic and Atmospheric Administration  
FOR CERTIFYING OFFICIAL: Simon Szykman  
FOR CLEARANCE OFFICER: Diana Hynek

In accordance with the Paperwork Reduction Act, OMB has taken action on your request received 08/26/2010

ACTION REQUESTED: New collection (Request for a new OMB Control Number)  
TYPE OF REVIEW REQUESTED: Regular  
ICR REFERENCE NUMBER: 201008-0648-009  
AGENCY ICR TRACKING NUMBER:  
TITLE: Green Sturgeon ESA 4(d) Rule Take Exceptions and Exemptions  
LIST OF INFORMATION COLLECTIONS: See next page

OMB ACTION: Approved without change  
OMB CONTROL NUMBER: 0648-0613

The agency is required to display the OMB Control Number and inform respondents of its legal significance in accordance with 5 CFR 1320.5(b).

EXPIRATION DATE: 10/31/2013

DISCONTINUE DATE:

BURDEN:	RESPONSES	HOURS	COSTS
Previous	0	0	0
New	67	1,528	189
Difference			
Change due to New Statute	0	0	0
Change due to Agency Discretion	67	1,528	189
Change due to Agency Adjustment	0	0	0
Change Due to Potential Violation of the PRA	0	0	0

TERMS OF CLEARANCE:

OMB Authorizing Official:

Kevin F. Neyland  
Deputy Administrator,  
Office Of Information And Regulatory Affairs

List of ICs

IC Title	Form No.	Form Name	CFR Citation
Scientific Research/Monitoring Exception			50 CFR 223.210
Scientific Resesarch/Monitoring Exception Report			50 CFR 223.210
Emergency Fish Rescue Report			50 CFR 223.210
Habitat Restoration Exception			50 CFR 223.210
Habitat Restoration Exception Report			50 CFR 223.210
Fishery Management and Evaluation Plans			50 CFR 223.210
FMEP report (biannual, annualized)			50 CFR 223.210
Tribal Fishery Management Plans			50 CFR 223.210
State Research Program			50 CFR 223.210
State Research Program Reports			50 CFR 223.210

# PAPERWORK REDUCTION ACT SUBMISSION

**Please read the instructions before completing this form. For additional forms or assistance in completing this form, contact your agency's Paperwork Clearance Officer. Send two copies of this form, the collection instrument to be reviewed, the supporting statement, and any additional documentation to: Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW, Washington, DC 20503.**

1. Agency/Subagency originating request	2. OMB control number <span style="float: right;">b. <input type="checkbox"/> None</span> a. _____ - _____
3. Type of information collection ( <i>check one</i> ) a. <input type="checkbox"/> New Collection b. <input type="checkbox"/> Revision of a currently approved collection c. <input type="checkbox"/> Extension of a currently approved collection d. <input type="checkbox"/> Reinstatement, without change, of a previously approved collection for which approval has expired e. <input type="checkbox"/> Reinstatement, with change, of a previously approved collection for which approval has expired f. <input type="checkbox"/> Existing collection in use without an OMB control number For b-f, note Item A2 of Supporting Statement instructions	4. Type of review requested ( <i>check one</i> ) a. <input type="checkbox"/> Regular submission b. <input type="checkbox"/> Emergency - Approval requested by _____ / _____ / _____ c. <input type="checkbox"/> Delegated
7. Title	5. Small entities Will this information collection have a significant economic impact on a substantial number of small entities? <input type="checkbox"/> Yes <input type="checkbox"/> No
8. Agency form number(s) ( <i>if applicable</i> )	6. Requested expiration date a. <input type="checkbox"/> Three years from approval date b. <input type="checkbox"/> Other Specify: _____ / _____
9. Keywords	10. Abstract
11. Affected public ( <i>Mark primary with "P" and all others that apply with "x"</i> ) a. ___ Individuals or households d. ___ Farms b. ___ Business or other for-profit e. ___ Federal Government c. ___ Not-for-profit institutions f. ___ State, Local or Tribal Government	12. Obligation to respond ( <i>check one</i> ) a. <input type="checkbox"/> Voluntary b. <input type="checkbox"/> Required to obtain or retain benefits c. <input type="checkbox"/> Mandatory
13. Annual recordkeeping and reporting burden a. Number of respondents _____ b. Total annual responses _____ 1. Percentage of these responses collected electronically _____ % c. Total annual hours requested _____ d. Current OMB inventory _____ e. Difference _____ f. Explanation of difference 1. Program change _____ 2. Adjustment _____	14. Annual reporting and recordkeeping cost burden ( <i>in thousands of dollars</i> ) a. Total annualized capital/startup costs _____ b. Total annual costs (O&M) _____ c. Total annualized cost requested _____ d. Current OMB inventory _____ e. Difference _____ f. Explanation of difference 1. Program change _____ 2. Adjustment _____
15. Purpose of information collection ( <i>Mark primary with "P" and all others that apply with "X"</i> ) a. ___ Application for benefits e. ___ Program planning or management b. ___ Program evaluation f. ___ Research c. ___ General purpose statistics g. ___ Regulatory or compliance d. ___ Audit	16. Frequency of recordkeeping or reporting ( <i>check all that apply</i> ) a. <input type="checkbox"/> Recordkeeping b. <input type="checkbox"/> Third party disclosure c. <input type="checkbox"/> Reporting 1. <input type="checkbox"/> On occasion 2. <input type="checkbox"/> Weekly 3. <input type="checkbox"/> Monthly 4. <input type="checkbox"/> Quarterly 5. <input type="checkbox"/> Semi-annually 6. <input type="checkbox"/> Annually 7. <input type="checkbox"/> Biennially 8. <input type="checkbox"/> Other (describe) _____
17. Statistical methods Does this information collection employ statistical methods <input type="checkbox"/> Yes <input type="checkbox"/> No	18. Agency Contact (person who can best answer questions regarding the content of this submission)  Name: _____ Phone: _____

## 19. Certification for Paperwork Reduction Act Submissions

On behalf of this Federal Agency, I certify that the collection of information encompassed by this request complies with 5 CFR 1320.9

**NOTE:** The text of 5 CFR 1320.9, and the related provisions of 5 CFR 1320.8(b)(3), appear at the end of the instructions. *The certification is to be made with reference to those regulatory provisions as set forth in the instructions.*

The following is a summary of the topics, regarding the proposed collection of information, that the certification covers:

- (a) It is necessary for the proper performance of agency functions;
- (b) It avoids unnecessary duplication;
- (c) It reduces burden on small entities;
- (d) It used plain, coherent, and unambiguous terminology that is understandable to respondents;
- (e) Its implementation will be consistent and compatible with current reporting and recordkeeping practices;
- (f) It indicates the retention period for recordkeeping requirements;
- (g) It informs respondents of the information called for under 5 CFR 1320.8(b)(3):
  - (i) Why the information is being collected;
  - (ii) Use of information;
  - (iii) Burden estimate;
  - (iv) Nature of response (voluntary, required for a benefit, mandatory);
  - (v) Nature and extent of confidentiality; and
  - (vi) Need to display currently valid OMB control number;
- (h) It was developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected (see note in Item 19 of instructions);
- (i) It uses effective and efficient statistical survey methodology; and
- (j) It makes appropriate use of information technology.

If you are unable to certify compliance with any of the provisions, identify the item below and explain the reason in Item 18 of the Supporting Statement.

Signature of Senior Official or designee

Date

Agency Certification (signature of Assistant Administrator or head of MB staff for L.O.s, or of the Director of a Program or Staff Office)

Signature

Date

Signature of NOAA Clearance Officer

Signature

Date

**SUPPORTING STATEMENT  
GREEN STURGEON ESA 4(D) RULE TAKE EXCEPTIONS AND EXEMPTIONS  
OMB NUMBER 00648-0xxx**

**A. JUSTIFICATION**

**1. Explain the circumstances that make the collection of information necessary.**

The Southern Distinct Population Segment (Southern DPS) of North American green sturgeon (*Acipenser medirostris*; hereafter, “Southern DPS”) was listed as a threatened species in April 2006. Section 4(d) of the Endangered Species Act of 1973 (ESA) authorizes the Secretary of Commerce to adopt regulations determined to be necessary and advisable for the conservation of species listed as threatened. Such regulations may include any or all of the prohibitions described in section 9(a)(1) of the ESA.

As the agency with jurisdiction over the species, the National Oceanic and Atmospheric Administration’s (NOAA) National Marine Fisheries Service (NMFS) determined that protective regulations (a “4(d) rule”) are necessary and advisable for the conservation of the Southern DPS. A proposed rule to establish protective regulations for the Southern DPS would apply all of the prohibitions listed under section 9(a)(1) of the ESA prohibiting the import, export, possession, sale, delivery, carrying, transport, shipment, and receipt in interstate or foreign commerce, or for commercial activity, of Southern DPS fish. The proposed rule would also prohibit the take of Southern DPS fish within the United States (U.S.), the U.S. territorial sea, or upon the high seas. Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct [ESA section 3(18)].

The proposed rule would establish exceptions to and exemptions from the take prohibitions for activities that NMFS determines to be adequately protective of the Southern DPS. Under the exceptions, specific activities would be excluded from the take prohibitions for the Southern DPS through a relatively informal coordination process. Under the exemptions, take of Southern DPS fish would be covered under a NMFS 4(d) program established and approved by NMFS through a formal process. The proposed rule also describes traditional methods for authorizing takes through ESA Section 7 or 10. In all of these circumstances, NMFS will depend on voluntary adherence to criteria and reporting requirements, preparation of formal 4(d) program packages, or submission of materials necessary to receive ESA permits so that: NMFS can: 1) assess the effects of the takes; 2) determine what category those takes fall under (i.e., excepted, exempted, prohibited); 3) approve 4(d) program plans or ESA applications that ultimately will authorize the takes.

**2. Explain how, by whom, how frequently, and for what purpose the information will be used. If the information collected will be disseminated to the public or used to support information that will be disseminated to the public, then explain how the collection complies with applicable information quality guidelines.**

To comply with the ESA and the regulations, entities must obtain take authorization prior to engaging in activities involving take of Southern DPS fish unless take is covered by an exception, an exemption, an ESA section 7 incidental take statement, or an ESA section 10

permit. Under an exception, certain activities would not be subject to the take prohibitions if they adhere to specific criteria and reporting requirements as specified in the 4(d) rule. Under an exemption, the take prohibitions would not apply to scientific research or monitoring, fisheries, or tribal resource management activities conducted under an approved 4(d) Program. Take authorization for Federal agency actions may be granted under an ESA section 7 incidental take statement. Take authorization for non-Federal actions may be granted under an ESA section 10(a)(1)(A) or 10(a)(1)(B) permit.

In order to ensure that activities qualify under the exceptions to or exemptions from the take prohibitions, local, state, and federal agencies, non-governmental organizations, academic researchers, and private organizations are asked to voluntarily submit detailed information regarding their activity on a schedule to be determined by NMFS staff. This information will be used by NMFS to (1) track the number of Southern DPS fish taken as a result of each action; (2) understand and evaluate the cumulative effects of each action on the Southern DPS; and (3) determine whether additional protections are needed for the species, or whether additional exceptions may be warranted. NMFS designed the criteria to ensure that plans meeting the criteria would adequately limit impacts on threatened Southern DPS fish, such that additional protections in the form of a federal take prohibition would not be necessary and advisable.

We describe the information collection for exceptions below:

- (1) Federal, state or private-sponsored research or monitoring activities; entities are asked to:
  - (a) Show that the activity complies with required state reviews or permits and NMFS sturgeon research protocols that are currently under development and will be finalized when the final 4(d) rule is published;
  - (b) Show that the research or monitoring activity is directed at the Southern DPS and not be incidental to research or monitoring of another species;
  - (c) Show that take of live mature adults in the lower Feather River from the confluence with the Sacramento River to the Oroville Dam (river kilometer (rkm) 116), the lower Yuba River from the confluence with the Feather River to the Daguerre Dam (rkm 19), or Suisun, San Pablo, and San Francisco Bays or the Sacramento-San Joaquin Delta from the Golden Gate Bridge up into the Sacramento River to Keswick Dam (rkm 483) only occurs from July 1 through March 1 so as to substantially increase the likelihood that uninterrupted upstream spawning migrations of adults will occur;
  - (d) Show that take is non-lethal;
  - (e) Show that take involving the removal of any life stage of the Southern DPS from the wild does not exceed 60 minutes;
  - (f) Show that take does not involve artificial spawning or enhancement activities;
  - (g) Provide a description of the study objectives and justification, a summary of the study design and methodology, estimates of the total non-lethal take of Southern DPS fish anticipated, estimates of incidental take of other ESA listed species anticipated and proof that those takes have been authorized by NMFS or the U.S. Fish and Wildlife Service

(USFWS), identification of funding sources, and a point of contact to NMFS at least 60 days prior to the start of the study;

(h) Include in the report the total number of Southern DPS and any other ESA listed species taken, information that supports that take was non-lethal, and a summary of the project results and submit this report to NMFS on a schedule to be determined by NMFS staff;

(i) Show that research or monitoring that involves action, permitting or funding by a federal agency complies with the requirements of ESA section 7(a)(2) in order to ensure that the action will not jeopardize the continued existence of the threatened Southern DPS.

(2) Emergency fish rescue and salvage activities - Entities are asked to:

(a) Show that the activity complies with required state or other Federal reviews or permits;

(b) Show that activities are conducted by an employee or designee of NMFS or the USFWS, any Federal land management agency, or California Department of Fish and Game (CDFG), Oregon Department of Fish and Wildlife (ODFW), Washington Department of Fish and Wildlife (WDFW), or Alaska Department of Fish and Game (ADFG);

(c) Show that the emergency rescue occurs because of emergency situations that result from natural disasters or national defense or security emergencies (see 50 CFR 402.05);

(d) Show that the emergency rescue benefits the Southern DPS;

(e) Submit a report has been submitted to NMFS that includes, at a minimum, the number and status of fish handled and the location of rescue and/or salvage operations within 30 days after conducting the emergency rescue.

(3) Habitat restoration activities; entities are asked to:

(a) Show that the activity complies with required state and Federal reviews and permits;

(b) Send a detailed description of the restoration activity to NMFS at least 60 days prior to the start of the restoration project which includes: the geographic area affected; when activities will occur; how they will be conducted; and the severity of direct, indirect, and cumulative impacts of activities on the Southern DPS; identification of funding sources; demonstration that all state and federal regulatory requirements have been met; a description of methods used to ensure that the likelihood of survival or recovery of the listed species is not reduced; a plan for minimizing and mitigating any adverse impacts to Southern DPS spawning or rearing habitat; an estimate of the amount of incidental take of the listed species that may occur and a description of how that estimate was made; a plan for effective monitoring and adaptive management; a pledge to use best available science and technology when conducting restoration activities; and a point of contact;

(c) Send progress reports that include the total number of Southern DPS taken, information regarding whether the take was lethal or non-lethal, a summary of the status of the project, and any changes in the methods being employed, to NMFS on a schedule to be determined by NMFS staff;

(d) Show that activities that involve action, permitting or funding by a federal agency comply with the requirements of ESA section 7(a)(2) in order to ensure that the action will not jeopardize the continued existence of the threatened Southern DPS.

We describe each information collection for 4(d) Program exemptions below:

(a) Fishery Management and Evaluation Plans (FMEP): Commercial and recreational fisheries activities would not be subject to the take prohibitions if conducted under an approved FMEP. Green sturgeon are not targeted, but are taken as bycatch in fisheries for other species, such as white sturgeon, salmon, and groundfish. To qualify for the exemption, fishery management agencies would prepare an FMEP and submit the plan to NMFS. NMFS would evaluate the plan based on its completeness and potential impact on the Southern DPS. NMFS may approve the plan or return the plan to the agency for revision. New or amended FMEPs would be published in the Federal Register for public comment prior to approval by NMFS. Decisions to withdraw approval for an FMEP would also be published in the Federal Register and subject to public comment.

Fishery management agencies seeking take authorization under an FMEP would be required to submit in writing to NMFS:

(i) The FMEP, including: prohibitions on the retention of green sturgeon; a bycatch management strategy, including maximum bycatch levels for green sturgeon and biologically-based rationale demonstrating how the measures will protect the Southern DPS; and plans for monitoring and evaluation, enforcement, and education. NMFS would use this information to evaluate the potential impacts of the plan on the Southern DPS.

(ii) Biannual reports to NMFS, including: the number of green sturgeon taken in the fishery and an evaluation and summary of the effectiveness of the FMEP. NMFS would use the reports to evaluate the FMEPs and recommend changes to improve the effectiveness of the FMEPs.

(b) Tribal Fishery Management Plans (TFMP): Fishery harvest activities conducted by a tribe, tribal member, tribal permittee, tribal employee, or tribal agent would not be subject to the take prohibitions if conducted in compliance with an approved TFMP. A TFMP may be developed by one tribe or jointly with other tribes and may vary in content. The Secretary of Commerce would consult with the tribe(s) on a government-to-government basis to provide technical assistance during development of a TFMP. The tribe or tribes would prepare a plan addressing fishery harvest activities and submit it to NMFS. NMFS would evaluate the plan based on its completeness and potential impact on the Southern DPS. Approval would also be contingent on a determination by the Secretary of Commerce that the TFMP would not appreciably reduce the likelihood of survival or recovery of the Southern DPS. NMFS may approve the plan or return the

plan to the tribe for revision. New or amended TFMPs and the Secretary's determination on the TFMP would be published in the Federal Register for public comment prior to approval.

- (c) State-sponsored scientific research programs: Scientific research activities involving incidental or direct take of listed species are typically authorized under ESA section 7 or 10. Establishment of state-sponsored scientific research programs between state fishery agencies and NMFS would provide an additional method for researchers to obtain take authorization. The programs would cover research and monitoring projects involving Southern DPS fish that are conducted by a state fishery agency (i.e., CDFG, ODFW, WDFW, or ADFG) or by recipients of a state fishery agency-issued permit. Such programs would help streamline the process for researchers, state agencies, and NMFS by allowing state fishery agencies to maintain primary responsibility for coordination and oversight of research activities. Each year, researchers would be required to submit research applications to the state fishery agency. State fishery agencies would evaluate and determine which projects are eligible for inclusion under the program and then transmit approved applications to NMFS for review and approval. Researchers would not be required to apply for a separate permit from NMFS. NMFS would continue to work with the state fishery agencies to ensure authorized research involving listed Southern DPS fish is both coordinated and conducted in a manner that prevents over-utilization of the resource.

State ESA 4(d) research programs have been developed and implemented in California, Oregon, and Washington for listed west coast salmon and steelhead. Within these programs, the state permit process has been adapted consistent with ESA requirements for research-related take of listed species. Green sturgeon would most likely be incorporated into the existing state ESA 4(d) research programs established for listed salmon and steelhead. Otherwise, the state would be required to prepare a program and submit it to NMFS for approval. NMFS may approve the program or return the program description to the agency for revision.

Under a state-sponsored scientific research program, the state fishery agency would be required to provide for NMFS' review and approval a list of all scientific research activities involving Southern DPS fish for the coming year, including for each project:

- (i) An estimate of the total direct or indirect take of Southern DPS fish that is anticipated;
- (ii) A description of the study design and methodology;
- (iii) A justification for take of Southern DPS fish and the techniques to be employed;
- (iv) A point of contact.

The state fishery agency would also be required to submit to NMFS an annual report that includes, for each project:

- (i) A summary of the number of green sturgeon taken directly or incidentally; and

- (ii) A summary of the results of the project, in order for NMFS to evaluate the effects of the research project on the Southern DPS.

It is anticipated that some of the information collected will be disseminated to the public or used to support publicly disseminated information. As explained in the preceding paragraphs, the information gathered has utility. NOAA's NMFS will retain control over the information and safeguard it from improper access, modification, and destruction, consistent with NOAA standards for confidentiality, privacy, and electronic information. See response to Question 10 of this Supporting Statement for more information on confidentiality and privacy. The information collection is designed to yield data that meet all applicable information quality guidelines. Prior to dissemination, the information will be subjected to quality control measures and a pre-dissemination review pursuant to Section 515 of Public Law 106-554.

**3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological techniques or other forms of information technology.**

The rule would not require any particular method of submission of plans or reports. A web-based system was developed for the state of Oregon's ESA 4(d) research program for listed salmon and steelhead Evolutionarily Significant Units (ESU), and is currently available for use by applicants in Oregon, Washington, and Idaho. Such a web-based system has also been developed for CDFG's ESA 4(d) research program for listed salmonids. The web-based system has helped streamline and standardize the application and authorization process for researchers, as well as the review process for state and NOAA biologists. Any state sponsored scientific research program developed for Southern DPS green sturgeon would likely be able to use the web-based system, or develop a similar web-based system.

Web-based systems have not been developed for the other exceptions or exemptions, but may be developed in the future. At the least, a summary of the criteria and instructions on how to apply for each exception would be posted on the NMFS website. In addition, NMFS-approved plans and programs and reports submitted under the exceptions would be made available to the public on the NMFS website. Certain plans and programs would be published in the Federal Register and subject to public comment.

**4. Describe efforts to identify duplication.**

Several of the exemptions under the proposed 4(d) rule were modeled after "limits" established in a 4(d) rule for listed West Coast salmon and steelhead. Thus, several of the information collections are similar to those required under the 4(d) rule for listed salmon and steelhead: (1) FMEPs; (2) TFMPs; and (3) state-sponsored scientific research programs. The collections for exceptions are unique to the Southern DPS. Although several of the collections are similar, separate collections are necessary for the Southern DPS because: (1) the plans and reports collected for listed salmon and steelhead do not address Southern DPS fish; and (2) the specific criteria for the plans and reports differ from those under the collections for listed salmon and steelhead.

In some cases, Southern DPS green sturgeon may be incorporated into existing programs. For example, NMFS would plan to incorporate Southern DPS green sturgeon into existing state-sponsored scientific research programs developed for listed salmon and steelhead ESUs in California, Oregon, and Washington. This would reduce the number of burden hours required by state fishery agencies to develop the programs. State fishery agencies may also choose to combine the annual reports for Southern DPS fish and listed salmon and steelhead ESUs into one report, because several studies may involve both Southern DPS fish and listed salmon and steelhead ESUs. In addition, existing water diversion screening programs may be revised to address concerns specific to Southern DPS green sturgeon.

In the absence of exceptions and the 4(d) rule exemptions, NMFS provides ESA coverage through section 10 research, enhancement, and incidental take permits for private entities, or through section 7 consultation with Federal agencies. The ESA section 7 and section 10 processes have their own specific reporting requirements associated with them.

**5. If the collection of information involves small businesses or other small entities, describe the methods used to minimize burden.**

None of these collections would have a significant impact on small entities. Most of the affected entities are state, local, tribal or Federal government.

**6. Describe the consequences to the Federal program or policy activities if the collection is not conducted or is conducted less frequently.**

If NMFS were not to provide exceptions or exemptions to the take prohibitions, then entities would be required to obtain take authorization under an ESA section 10 permit for non-Federal agency actions, or an ESA section 7 consultation for Federal agency actions. Without an ESA section 10 permit or a completed ESA section 7 consultation, the entity would remain at risk of ESA enforcement for violation of the take prohibitions. In some cases, the exceptions would provide a more stream-lined process and facilitate coordination among the entities, the States, and NMFS. In addition, the protective measures implemented under the plans and programs may benefit other species.

The information collections under the exceptions and exemptions would serve several purposes, each vital to NMFS' ability to protect and conserve the Southern DPS. The information collections (i.e., the plans, programs, and reports) would: (1) inform NMFS of proposed actions that may result in take of Southern DPS fish; (2) allow NMFS to evaluate and provide feedback on the potential effects of actions on the Southern DPS and to determine whether the actions meet criteria under the exceptions; and (3) provide NMFS with data and regular updates on the actions. Not collecting plans and programs, or collecting reports less frequently, would hinder NMFS' ability to provide for the conservation of the Southern DPS.

**7. Explain any special circumstances that require the collection to be conducted in a manner inconsistent with OMB guidelines.**

This information collection is consistent with OMB guidelines (5 CFR 1320.6).

**8. Provide information on the PRA Federal Register Notice that solicited public comments on the information collection prior to this submission. Summarize the public comments received in response to that notice and describe the actions taken by the agency in response to those comments. Describe the efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.**

A proposed rule, Regulation Identifier Number (RIN) 0648-AV94, to establish protective regulations under section 4(d) of the ESA for the threatened Southern DPS of green sturgeon, was published in the Federal Register on May 21, 2009 (74 FR 23822) seeking public comment on the proposed protective regulations and the proposed information collections.

**9. Explain any decisions to provide payments or gifts to respondents, other than remuneration of contractors or grantees.**

No payments, gifts, or remuneration are associated with these voluntary collections of information.

**10. Describe any assurance of confidentiality provided to respondents and the basis for assurance in statute, regulation, or agency policy.**

There are no assurances of confidentiality associated with these voluntary collections of information. The information supplied would be a matter of public record.

**11. Provide additional justification for any questions of sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.**

No questions of a sensitive nature are included in this information collection.

**12. Provide an estimate in hours of the burden of the collection of information.**

The estimated total number of respondents is 38. The total number of annual responses is 67, and the recordkeeping and reporting burden to the general public for the green sturgeon 4(d) rule take exceptions is estimated to be 1,528 hours per year. The estimated annual labor cost to the general public to apply for coverage under the green sturgeon 4(d) rule take exceptions and to comply with the requirements under the exceptions is approximately \$27,495. Table 1 summarizes the estimated annual number of responses, average hours per response, total annual hours, labor cost per response, and total annual labor costs for each information collection.

**13. Provide an estimate of the total annual cost burden to the respondents or record-keepers resulting from the collection (excluding the value of the burden hours in Question 12 above).**

The estimated total number of respondents is 38, and the estimated annual cost to the general public, excluding burden hours, such as maintenance and submission costs associated with the green sturgeon 4(d) rule take exceptions and exemptions, is approximately \$185.63 (rounded to

\$189 in ROCIS). There are no capital or start-up costs associated with this information collection. Table 2 summarizes the annual number of responses, average operations and maintenance costs per response, and total annual operations and maintenance costs for each information collection.

**14. Provide estimates of annualized cost to the Federal government.**

The estimated annual costs for processing submissions for the green sturgeon 4(d) rule take exceptions and exemptions and responding to the reporting requirements to the Federal government was determined by calculating the total time necessary for staff to complete the response and multiplying the amount by \$18 per hour. The total annual estimated cost to the Federal government is \$17,406. Table 3 summarizes the annual number of responses, average processing time per response, total annual processing hours, cost per response, and total annual costs for each information collection.

**15. Explain the reasons for any program changes or adjustments.**

Not applicable. This is a new information collection.

**16. For collections whose results will be published, outline the plans for tabulation and publication.**

As described above under Question 2, several of the plans and programs would be required to be published in the Federal Register for public comment prior to approval under the exceptions. NMFS plans to make available on the NMFS Southwest Region website the approved plans and programs and annual reports submitted in compliance with the requirements under the exceptions.

**17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons why display would be inappropriate.**

Not applicable.

**18. Explain each exception to the certification statement.**

Not applicable.

**B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS**

Not applicable. This information collection request does not employ statistical methods.

Table 1. Summary of the estimated annual number of responses, average hours per response, total annual burden hours, labor cost per response, and total annual labor costs to the public resulting from the information collections.

<b>Information Collection</b>	<b>Annual # Responses</b>	<b>Av. Hours Per Response</b>	<b>Total Annual Hours</b>	<b>Labor Cost Per Response (@\$18/Hr)</b>	<b>Total Annual Labor Costs</b>
Scientific Research/monitoring exception	10	40	400	\$720	\$7,200
Scientific Research/monitoring exception report	10	5	50	\$90	\$900
Emergency fish rescue reports	3	5	15	\$90	\$270
Habitat Restoration exception	10	40	400	\$720	\$7,200
Habitat Restoration exception report	10	5	50	\$90	\$900
FMEP	10	40	400	\$720	\$7,200
FMEP report (biannual)	5	2.5	12.5	\$45	\$225
TFMP	1	20	20	\$360	\$360
State research program	4	40	160	\$720	\$2,880
Research reports	4	5	20	\$90	\$360
<b>TOTAL</b>	<b>67</b>		<b>1,527.5</b>		<b>\$27,495</b>

Table 2. Summary of the estimated annual number of responses, average operations and maintenance costs per response, and total annual operations and maintenance costs to the public resulting from the information collections.

<b>Information Collection</b>	<b>Annual # Responses</b>	<b>Av. Operations &amp; Maintenance Costs Per Response</b>	<b>Total Annual Operations &amp; Maintenance Costs</b>
Scientific Research/monitoring exception	10	\$1.00 (copy) + \$1.65 (postage) = \$2.65	\$26.50
Scientific Research/monitoring exception report	10	\$1.00 (copy) + \$1.65 (postage) = \$2.65	\$26.50
Emergency fish rescue reports	3	\$1.00 (copy) + \$1.65 (postage) = \$1.65	\$7.95
Habitat Restoration exception	10	\$1.00 (copy) + \$1.65 (postage) = \$2.65	\$26.50
Habitat Restoration exception report	10	\$1.00 (copy) + \$1.65 (postage) = \$2.65	\$26.50
FMEP	10	\$1.00 (copy) + \$1.65 (postage) = \$2.65	\$26.50
FMEP report (biannual)	5	\$1.00 (copy) + \$1.65 (postage) = \$2.65	\$13.25
TFMP	1	\$1.00 (copy) + \$1.65 (postage) = \$2.65	\$2.65
State research program	4	\$2.00 (copy) + \$2.67 (postage) = \$4.67	\$18.68
Research reports	4	\$1.00 (copy) + \$1.65 (postage) = \$2.65	\$10.60
<b>TOTAL</b>	<b>67</b>		<b>\$185.63 (ROCIS rounded to \$189)</b>

Table 3. Summary of the estimated annual number of responses, average Federal government processing hours per response, total annual processing hours, average cost to process each response, and total annual costs to the Federal government resulting from the information collections.

<b>Information Collection</b>	<b>Annual # Responses</b>	<b>Av. Processing Hours Per Response</b>	<b>Total Annual Processing Hours</b>	<b>Cost Per Response (@\$18/Hr)</b>	<b>Total Annual Costs</b>
Scientific Research/monitoring exception	10	20	200	\$360	\$3,600
Scientific Research/monitoring exception report	10	8	80	\$144	\$1,440
Emergency fish rescue reports	3	5	15	\$90	\$270
Habitat Restoration exception	10	20	200	\$360	\$3,600
Habitat Restoration exception report	10	8	80	\$144	\$1,440
FMEP	10	20	200	\$360	\$3,600
FMEP report (biannual)	5	8	40	\$72	\$720
TFMP	1	40	40	\$720	\$720
State research program	4	20	80	\$360	\$1,440
Research reports	4	8	32	\$144	\$576
<b>TOTAL</b>	<b>67</b>		<b>967</b>		<b>\$17,406</b>

Center frequency (MHz)	Channel Nos. employed	Lower frequency (MHz)	Upper frequency (MHz)
4975 .....	11 & 12 .....	4970	4980
4980 .....	12 & 13 .....	4975	4985
4985 .....	13 to 18 <sup>1</sup> .....	4980	4990

<sup>1</sup> These channels should only be used if all other channels are blocked.

(3) 15 MHz bandwidth aggregation:

Center frequency (MHz)	Channel Nos. employed	Lower frequency (MHz)	Upper frequency (MHz)
4947.5 .....	1 to 7 <sup>1</sup> .....	4940	4955
4952.5 .....	6 to 8 .....	4945	4960
4957.5 .....	7 to 9 .....	4950	4965
4962.5 .....	8 to 10 .....	4955	4970
4967.5 .....	9 to 11 .....	4960	4975
4972.5 .....	10 to 12 .....	4965	4980
4977.5 .....	11 to 13 .....	4970	4985
4982.5 .....	12 to 18 <sup>1</sup> .....	4975	4990

<sup>1</sup> These channels should only be used if all other channels are blocked.

(4) 20 MHz bandwidth aggregation:

Center frequency (MHz)	Channel Nos. employed	Lower frequency (MHz)	Upper frequency (MHz)
4950 .....	1 to 8 <sup>1</sup> .....	4940	4960
4955 .....	6 to 9 .....	4945	4965
4960 .....	7 to 10 .....	4950	4970
4965 .....	8 to 11 .....	4955	4975
4970 .....	9 to 12 .....	4960	4980
4975 .....	10 to 13 .....	4965	4985
4980 .....	11 to 18 <sup>1</sup> .....	4970	4990

<sup>1</sup> These channels should only be used if all other channels are blocked.

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 223**

[Docket No. 070910507-81216-02]

RIN 0648-AV94

**Endangered and Threatened Wildlife and Plants: Proposed Rulemaking to Establish Take Prohibitions for the Threatened Southern Distinct Population Segment of North American Green Sturgeon**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; request for comments; notice of availability of a draft environmental assessment.

**SUMMARY:** Under section 4(d) of the Endangered Species Act (ESA), the Secretary of Commerce (Secretary) is required to adopt such regulations as he deems necessary and advisable for the conservation of species listed as threatened. This proposed ESA 4(d) rule represents the regulations that we, the National Marine Fisheries Service (NMFS), believe necessary and advisable to conserve the threatened Southern Distinct Population Segment of North American green sturgeon (*Acipenser medirostris*; hereafter Southern DPS). We propose to apply the prohibitions listed under ESA sections 9(a)(1)(A) through 9(a)(1)(G) for the Southern DPS, and we highlight specific categories of activities that are likely to result in take of Southern DPS fish. We do not find it necessary and advisable to apply the take prohibitions to certain categories of activities that contribute to conserving the Southern DPS. We also propose a variety of methods by which take of the Southern DPS may be authorized.

We announce the availability of a draft environmental assessment (EA) that analyzes the environmental impacts of promulgating these proposed 4(d) regulations for the Southern DPS. Finally, we solicit comments regarding the draft EA and this proposed rule.

**DATES:** Comments regarding the proposed rule and supporting documents may be sent to the appropriate address or fax number (see **ADDRESSES**), no later than 5 p.m. Pacific Standard Time on July 20, 2009. A public hearing will be held promptly if any person so requests by July 6, 2009. Notice of the location and time of any such hearing will be published in the **Federal Register** not less than 15 days before the hearing is held.

**ADDRESSES:** You may submit comments, identified by RIN 0648-AV94, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>.
- Facsimile (fax): 562-980-4027, Attn: Melissa Neuman.

• Mail: Submit written comments to Chief, Protected Resources Division, Attn: Melissa Neuman, Southwest Region, National Marine Fisheries Service, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

We will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

A list of reference materials regarding this proposed rule can be obtained via the Internet at <http://www.swr.nmfs.noaa.gov> or by submitting a request to the Assistant Regional Administrator, Protected Resources Division, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213.

**FOR FURTHER INFORMATION CONTACT:** Melissa Neuman, NMFS, Southwest Region (562) 980-4115 or Lisa Manning, NMFS, Office of Protected Resources (301) 713-1401.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

We determined that the Southern DPS is at risk of extinction in the foreseeable future throughout all or a significant portion of its range and listed the species as threatened under the ESA on April 7, 2006 (71 FR 17757). At that time we summarized the process for considering the application of ESA section 9 prohibitions to the threatened Southern DPS. In the case of threatened species, ESA section 4(d) states that the Secretary shall decide whether, and to what extent, to extend the section 9(a) prohibitions, including those regarding take, to the species, and authorizes us to issue regulations we consider necessary and advisable for the conservation of the species. Such regulations may include any or all of the prohibitions that automatically apply to endangered species. Those prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take the listed species. The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such

conduct. (16 U.S.C. 1532(19)). The term “harm” is defined as any act which kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation that results in death or injury of wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding, or sheltering. (50 CFR 222.102).

Whether take prohibitions or other protective regulations are necessary or advisable is in large part dependent on the biological status of the species and potential impacts of various activities on the species. Green sturgeon have persisted for millions of years through cycles of naturally occurring perturbations that have likely presented short- and long-term challenges to the species’ survival. We conclude that the threatened Southern DPS of North American green sturgeon is currently at risk of extinction primarily because of human-induced “takes” involving elimination of freshwater spawning habitat, degradation of freshwater and estuarine habitat quality, water diversions, fishing, and other causes. Therefore, we conclude that extending the take prohibitions to the Southern DPS is necessary and advisable.

When the final rule to list the Southern DPS was published on April 7, 2006, we solicited the public for information that would inform the ESA section 4(d) rulemaking. Specifically, we requested information regarding: (1) green sturgeon spawning habitat within the range of the Southern DPS that was present in the past, but may have been lost over time; (2) biological or other relevant data concerning any threats to the Southern DPS; (3) current or planned activities within the range of the Southern DPS and their possible impact on the Southern DPS; (4) efforts being made to protect the Southern DPS; (5) necessary prohibitions on take to promote the conservation of the Southern DPS; (6) quantitative evaluations describing the quality and extent of freshwater and marine habitats (occupied currently or occupied in the past, but no longer occupied) for juvenile and adult Southern DPS fish; (7) activities that could be affected by an ESA section 4(d) rule; and (8) the economic costs and benefits of additional requirements of management measures likely to result from protective regulations. No substantive additional comments, beyond those that had been received during prior solicitations for information, were received.

Public scoping workshops held on May 31 and June 1, 2006, helped advance our understanding of the threats that are likely to result in the

take of Southern DPS fish. In cases where evidence of direct take due to a particular activity was lacking, activities that have caused take in species that use similar habitats (i.e., migratory, spawning, and rearing), consume similar prey types, have similar morphologies and/or physiologies, and/or share other life history requirements (e.g., white sturgeon (*Acipenser transmontanus*) and chinook salmon (*Oncorhynchus tshawytscha*)) were identified and considered for their effects on Southern DPS fish. More detailed justification regarding the use of take information for surrogate species (i.e. one that shares a similar life history or habitat requirement) to infer the take potential of an activity on the Southern DPS fish is provided in previous **Federal Register** notices (70 FR 17386, April 6, 2005; 71 FR 17757, April 7, 2006).

We conclude that the threatened Southern DPS of North American green sturgeon is at risk of extinction primarily because its populations have been reduced by human “take,” through activities that include, but are not limited to: (1) commercial and recreational fisheries activities that directly target or incidentally catch Southern DPS fish; (2) tribal fisheries activities that directly target or incidentally catch Southern DPS fish; (3) poaching; (4) collecting or handling Southern DPS fish for activities such as research, monitoring, and emergency rescues; (5) habitat-altering activities that result in the elimination, obstruction or delay of passage of adult Southern DPS fish to and from spawning areas, or otherwise result in the inability of adult Southern DPS fish to migrate to and from spawning areas; (6) habitat-altering activities that result in the destruction, modification or curtailment of spawning or rearing habitat for egg, larval or juvenile stages; (7) habitat altering activities that result in the elimination, obstruction or delay of downstream passage of larval or juvenile stages of Southern DPS fish; (8) entrainment and impingement of any life stage of Southern DPS fish during the operation of water diversions, dredging or power generating projects; (9) application of pesticides adjacent to or within waterways that contain any life stage of Southern DPS fish at levels that adversely affect the biological requirements of the Southern DPS; (10) discharge or dumping of toxic chemicals or other pollutants into waters or areas that contain Southern DPS fish; and (11) introducing or releasing non-native species likely to alter the Southern DPS’

habitat or to compete with the Southern DPS for space or food.

#### Spatial Context for Proposed 4(d) Rule Application

As described in a **Federal Register** notice (68 FR 4433) published on January 23, 2003, we determined that based on genetic and behavioral information, North American green sturgeon is comprised of at least two DPSs that qualify as species under the ESA: (1) a northern DPS consisting of populations originating from coastal watersheds northward of and including the Eel River ("Northern DPS"); and (2) a southern DPS consisting of populations originating from coastal watersheds south of the Eel River ("Southern DPS") and the Central Valley of California. These geographic boundaries were largely defined by genetic evidence indicating that, among samples from rivers where green sturgeon are known to spawn (i.e. the Rogue, Klamath, and Sacramento rivers), the Rogue and Klamath River fish were more similar to one another than to the Sacramento River fish (Israel *et al.*, 2004). Although the Southern DPS boundaries are defined by the species' genetic structure and its likely strong homing capabilities and spawning site fidelity, the spatial extent of the ESA listing and proposed take prohibitions for the Southern DPS is not confined to areas south of the Eel River. Southern DPS subadults and adults tagged in San Pablo Bay, a northern extension of San Francisco Bay, have been tracked in estuarine and marine waters far north of the Eel River (Lindley *et al.*, 2008), and preliminary genetic mixed stock analyses indicate that a proportion of green sturgeon in many estuaries north of the Eel River DPS boundary are of Southern DPS origin (J. Israel, UC Davis, 2006, unpublished data).

Tracking data, genetic mixed stock analysis, and direct observation indicate that Southern DPS fish occur in freshwater rivers and coastal estuaries and bays along the west coast of North America, including, but not limited to: San Pablo Bay, CA; Suisun Bay, CA; San Francisco Bay, CA (Radtke, 1966; CDFG, 2002; Kelly *et al.*, 2006; J. McLain, USFWS, 2006, unpublished data; Department of Water Resources Bay Delta and Tributaries data base, 2005, <http://bdat.ca.gov/index.html>); the Sacramento-San Joaquin Delta in the Central Valley California (Radtke, 1966; CDFG, 2002; Wang, 2006); Sacramento River, CA (USFWS, 1992; Adams *et al.*, 2002; Gaines and Martin, 2002; Israel *et al.*, 2004; Heublein *et al.*, in press); lower Feather River, CA (Adams *et al.*, 2006; A. Seeholtz, CDWR, 2008,

unpublished data; FERC, 2008, unpublished data); lower Yuba River, CA (Adams *et al.*, 2002; CDFG, 2002; G. Reedy, South Yuba River Citizens League, 2006, unpublished data); Humboldt Bay, CA (Moyle *et al.*, 1992; B. Pinnix, USFWS, 2008, unpublished data; S. Lindley, NMFS, 2008, unpublished data); Coos Bay, OR (Lindley and Moser, 2006); Winchester Bay, OR (Lindley and Moser, 2006; J. Israel, UC Davis, 2006, unpublished data); Yaquina Bay, OR (Emmett *et al.*, 1991; ODFW, 2002; D. M. Nelson, 2008, Letter to Steve Stone; J. Hightower, USGS, 2006, unpublished data); lower Columbia River and estuary, OR and WA (Israel *et al.*, 2004; Lindley and Moser, 2006; WDFW, 2006, unpublished data; ODFW, 2006, unpublished data); Willapa Bay, WA (Lindley and Moser, 2006; J. Israel and B. May, UC Davis, 2006, unpublished data; WDFW, unpublished data; ODFW, unpublished data); Grays Harbor, WA (Lindley and Moser, 2006; J. Israel and B. May, UC Davis, 2006, unpublished data); and Puget Sound, WA (Lindley and Moser, 2006). Southern DPS fish also occur in coastal waters within 110 meters depth from Monterey Bay, CA, to Yakutat Bay, AK (Lindley and Moser, 2006; Lindley *et al.*, 2008), including the Strait of Juan de Fuca, WA.

Green sturgeon have also been observed or collected in the following coastal rivers, estuaries, and marine waters; however, in many of these cases, individuals were not identified to the DPS level: Elkhorn Slough, CA (Moyle *et al.*, 1992; Yoklavich *et al.*, 2002; S. Lindley, NMFS, 2008, unpublished data; C. Raifsnider and J. Steinbeck, Tenera Environmental, 2006, personal communication); Tomales Bay, CA (Moyle *et al.*, 1992; J. McLain, USFWS, 2006, unpublished data); Noyo Harbor, CA (Moyle *et al.*, 1992; D. Catania, California Academy of Sciences, 2006, personal communication); Eel River, CA (Moyle *et al.*, 1992; Adams *et al.*, 2006); Klamath/Trinity River, CA (Nakamoto *et al.*, 1995; VanEenenaam *et al.*, 2001; Adams *et al.*, 2002; Adams *et al.*, 2006; VanEenenaam *et al.*, 2006; Benson *et al.*, 2007); Rogue River, OR (Rien *et al.*, 2001; Adams *et al.*, 2002; Erickson *et al.*, 2002; Adams *et al.*, 2006; Erickson and Hightower, 2007; Erickson and Webb, 2007; Webb and Erickson, 2007); Siuslaw River, OR (Emmett *et al.*, 1991; S. Lindley and M. Moser, NMFS, 2008, unpublished data); Alsea River, OR (Emmett *et al.*, 1991; D. M. Nelson, 2008, Letter to Steve Stone); Tillamook Bay, OR (Emmett *et al.*, 1991; ODFW, 1997; ODFW, 2002; D. M. Nelson, 2008, Letter to Steve Stone); coastal waters

within 110 m depth from the California/Mexico border to Monterey Bay, CA (Roedel, 1941; Norris, 1957; R. Rasmussen, NMFS, 2006, unpublished data); and coastal waters northwest of Yakutat Bay, AK, including portions of the Gulf of Alaska, and the Bering Sea (J. Ferdinand and D. Stevenson, NMFS, 2006, unpublished data).

#### Evaluation of Activities

While this proposal applies the take prohibitions to any activity that takes the Southern DPS, we wanted to determine which activities would most likely impede efforts necessary to conserve and recover the Southern DPS. To do this, we considered the following questions: (1) For which activities do we have evidence of take of Southern DPS fish; (2) for those activities where evidence of Southern DPS take does not exist, is there evidence of take of surrogate species that share similar biological requirements with Southern DPS fish; (3) are protective/conservation measures underway to reduce or minimize take imposed by some activities; and (4) are there additional protective/conservation measures that, if taken, would reduce take to low enough levels such that particular activities could proceed without appreciably reducing the likelihood of survival and recovery of the Southern DPS?

#### Commercial and Recreational Fisheries Activities

Take of Southern DPS fish occurs during commercial and recreational fishing activities throughout the range of North American green sturgeon. However, quantifying fishery-related take reliably and assessing its effects is challenging because: (1) Northern and Southern DPS fish are morphologically indistinguishable from one another and when green sturgeon have been taken, they have rarely been identified to the DPS level; (2) until recently some fisheries did not report green sturgeon take, and (3) in cases where data on take of green sturgeon is available, methods for estimating the total annual take by a fishery are still being developed. The two DPSs co-inhabit some coastal areas and bays in Northern California, Oregon, and Washington, and the proportion of Southern DPS fish contributing to overall populations in these areas may be high (e.g., 80 percent in the Columbia River; J. Israel, UC Davis, 2008, unpublished data). Thus, while we know that fisheries-related take is occurring, we are uncertain how this take is apportioned between the two DPSs, different locales, and different types of fisheries.

Green sturgeon are taken as bycatch in white sturgeon fisheries, salmon gillnet fisheries, coastal groundfish trawl fisheries, and coastal California halibut set net fisheries (Adams *et al.*, 2006; R. Rasmussen, NMFS, 2006, unpublished data; J. Ferdinand *et al.*, NMFS, 2006, unpublished data). These fisheries have taken large numbers of green sturgeon historically and have been cited as factors in the decline of the species (70 FR 17386, April 6, 2005; 71 FR 17757, April 7, 2006). For example, from 1985 to 1993, the harvest of green sturgeon in commercial fisheries in the Columbia River and in Washington ranged from 3,000 to over 7,500 fish per year. Sport fishing harvest during the same period ranged from less than 100 to over 500 fish, with the majority harvested from the Columbia River. Since 1993, commercial and sport harvest of green sturgeon has declined in the Columbia River and Washington fisheries to about 150 fish harvested in 2003 (Adams *et al.* 2006).

State recreational and commercial fishing regulations have been revised in response to evidence of recent sturgeon declines and to the listing of the Southern DPS. In California, the California Fish and Game Commission approved revised regulations, effective March 1, 2007, to prohibit retention of green sturgeon, alter the slot (size) limit (142 cm) and bag limit (one individual daily; 3 individuals annually) for white sturgeon, and require implementation of a sturgeon report card system. The Washington Fish and Wildlife Commission adopted a permanent rule to prohibit retention of green sturgeon in recreational fisheries statewide effective May 1, 2007. In addition, the Washington Department of Fish and Wildlife and Oregon Department of Fish and Wildlife voted to prohibit the retention of green sturgeon in Columbia River recreational fisheries from Bonneville Dam to the mouth of the river, effective January 1, 2007. For commercial fisheries, the retention of green sturgeon has been prohibited in the Columbia River by emergency rule since July 2006 and statewide in Washington by permanent rule since January 26, 2007. The State of California has prohibited commercial fishing for sturgeon since 1917. While these emergency and permanent rules offer Southern DPS fish protection, it is unclear whether the state closures will remain in effect over the long-term and ultimately what overall effect the closures will have on the Southern DPS.

Commercial groundfish trawl fisheries occurring in coastal waters along the West coast of North America take green sturgeon. Fish are primarily caught as

bycatch off the coast of California. Over a 6-year period, from 2001–2007, 450 green sturgeon were reported as bycatch in trawls off the California coast. Almost all green sturgeon caught in this fishery are released alive (J. Majewski, NMFS, 2006, unpublished data), but the long-term fate of these individuals remains unknown. A program for monitoring green sturgeon take was established with the NMFS Observer Program in January 2007. Additional measures that may be implemented to protect green sturgeon and the Southern DPS include zero retention of green sturgeon in all fisheries, minimizing incidental catch, monitoring of incidental catch, increased enforcement, fisheries closures in areas important to the species, and outreach and education on proper catch and release methods and green sturgeon conservation issues.

#### *Tribal Fisheries*

Green sturgeon are taken as bycatch in tribal salmon and sturgeon fisheries conducted by the Quinault Tribe in coastal Washington waters. Tribal harvest of green sturgeon occurs in Grays Harbor and at the mouth of tributaries, primarily the Chehalis and Humptulips rivers. The number of green sturgeon taken annually from 1985 to 2003 ranged from less than 10 to almost 200 fish (Adams *et al.*, 2006). In 2006, the Quinault Tribe implemented zero retention of green sturgeon for the Grays Harbor fishery (J. Schumacker, Quinault Indian Tribe, 2006, personal communication). A large proportion of green sturgeon caught in Grays Harbor may be Southern DPS fish, based on hydroacoustic tracking information (Lindley and Moser, 2006) and a genetic study indicating that approximately 50 percent of green sturgeon sampled in Grays Harbor belong to the Southern DPS (J. Israel and B. May, UC Davis, 2006, unpublished data).

Green sturgeon are also taken, though rarely, in tribal commercial and subsistence salmon fisheries occurring in freshwater and coastal marine waters of Washington, including the Strait of Juan de Fuca, Georgia and Rosario straits, and Puget Sound (W. Beattie, NW Indian Fisheries Commission, 2008, personal communication). The Yurok and Hoopa Tribes harvest green sturgeon in the Klamath River in California, but most of the fish are believed to be Northern DPS green sturgeon (J. Israel, UC Davis, 2006, unpublished data). Overall, the take of green sturgeon in tribal fisheries has been low compared to non-tribal fisheries. Measures that may be implemented to conserve the Southern DPS include a commitment by the

Quinault Tribe, and perhaps other Tribes within the occupied range of the Southern DPS, to minimize take and monitor incidental catch of green sturgeon over the long-term.

#### *Poaching*

Poaching is a potential threat to the Southern DPS. In recent years, several arrests have been made for illegal harvest of white sturgeon for their meat and roe from the Sacramento River (CDFG, 2003 and 2006), the Sacramento-San Joaquin Delta (CDFG, 2004), and the lower Columbia River (Cohen, 1997). In the lower Columbia River, an estimated 2,000 sturgeon were killed over a 5-year period by poachers to produce caviar (Cohen, 1997). Poaching may be less significant than incidental take associated with white sturgeon sportfishing (Williamson, 2003). However, the tendency for green sturgeon to form aggregations for long periods of time may make them easy targets for poachers (Erickson *et al.*, 2002). Increased public outreach and awareness, increased enforcement, and heavier sentences and fines for poachers may help to protect green sturgeon from the threats of poaching.

#### *Research, Monitoring and Enforcement Activities*

Scientific research and monitoring of the Southern DPS contributes valuable information for the management, conservation, and future status reviews of the species. However, collection or handling associated with scientific research and monitoring constitutes take and may result in stress, injuries, or mortality of Southern DPS fish. In recent years, much research and monitoring effort has been placed on: (1) tracking the movements and habitat use of Southern DPS fish by using a variety of non-lethal tagging techniques; and (2) identifying the DPS of origin using non-lethal genetic sampling techniques. These two research and monitoring activities provide information crucial to the development of an effective recovery strategy for the species. The best available information indicates that these procedures, when done according to accepted protocols, result in minimal short-term stress to the fish and do not result in lethal take. Important scientific information (e.g., genetic, pathologic, taxonomic, meristic) is also gathered from already dead individuals, thereby providing valuable data without putting the species at further risk.

Enforcement of the ESA and its implementing regulations is an essential component of protecting and recovering

species once they are listed.

Enforcement of this proposed regulation for the Southern DPS of green sturgeon may involve take. For example, when acting in the course of his or her official duties, a NMFS enforcement agent investigating an alleged ESA take violation may need to collect a Southern DPS fish or samples thereof as evidence of the violation.

#### *Emergency Rescue and Salvage Activities*

Emergency fish rescue activities, including aiding sick, injured, or stranded fish, disposing of dead fish, or salvaging dead fish for use in scientific studies, are forms of take. Rescue activities would benefit the Southern DPS in the event of emergency situations that result from natural disasters or national defense or security emergencies (see 50 CFR 402.05). Activities such as the rescue of fish stranded behind a man-made barrier (e.g., weirs, nets, dams) are not considered emergency fish rescue activities and should be subject to NMFS ESA review.

#### *Habitat-altering Activities*

Dams and water diversion structures have caused the elimination, obstruction, or delay of passage for green sturgeon and other sturgeon species and may reduce body condition and reproductive success. For example, dams and water diversion structures have been observed to obstruct or disrupt the upstream spawning migrations of shortnose sturgeon in the lower Cape Fear River, NC (Moser and Ross, 1995). White sturgeon have also been found stranded behind the Fremont Weir in the Yolo Bypass, CA (Harrell and Sommer, 2006). Disruptions in migration may cause fish to stop their upstream migration or may delay access to spawning habitats (Moser and Ross, 1995). The inability to reach spawning habitats may cause fish to spawn in habitats of lower quality, resulting in decreased recruitment (Cooke and Leach, 2004). Several dams and water diversion structures exist along the spawning migration route of the Southern DPS and would be expected to have detrimental effects similar to those observed in surrogate species. Fish passage studies at the Red Bluff Diversion Dam (RBDD) in the Sacramento River show that the RBDD blocks the upstream migration of the Southern DPS when the gates are lowered between May 15 and September 15 (Heublein *et al.*, 2006; Brown, 2007). Mitigation measures have been implemented, including the raising of RBDD gates from September 15 to May

15 each year to allow fish passage and the protection and restoration of spawning and rearing habitat along the Sacramento River, bays, and the Sacramento-San Joaquin Delta. However, when the gates are raised, green sturgeon may become disoriented or suffer injuries due to the high velocity of water passing under the gates (M. Tucker, NMFS, 2007, personal communication). Between May 18 and June 10, 2007, carcasses of 10 adult Southern DPS fish (168–226 cm total length) were found at (n=2) or downstream (n=8) of RBDD (E. Campbell, USFWS, 2007, unpublished data). Locations of the retrieved carcasses and necropsy results suggest that the fish suffered mortality due to injuries inflicted by the gates at RBDD. Installation of adequate fish passage facilities, modification of existing passage facilities, or other provisions to specifically aid sturgeon passage at dams and diversions, and application of other mitigation measures, such as salvage operations, would contribute to the protection of the Southern DPS.

The elimination, obstruction, or delay of downstream passage is a concern for larval and juvenile stages of the Southern DPS, as are habitat-altering activities that destroy, modify, or curtail spawning or rearing habitats for egg, larval, or juvenile stages. Specific concerns include, but are not limited to: increased sediment input or runoff into streams; filling in or isolation of stream channels, side channels, and intermittent waters; direct removal or alteration of physical structures; and obstruction of downstream migration.

Increased input or runoff of fine sediments into streams may result from a number of activities including, but not limited to, mining, logging, farming, grazing, and bridge and road construction. Increased erosion and sediment input or runoff into streams caused by land use and other human activities have been found to reduce the survival and successful development of eggs and embryos of salmon and other fish species (Scrivener and Brownlee, 1989; Owen *et al.*, 2005). The effects on green sturgeon eggs and embryos are likely to be similar. Green sturgeon eggs are large and dense and likely sink into rock crevices or attach to hard surfaces (Deng *et al.*, 2002; Kynard *et al.*, 2005). Once hatched, green sturgeon embryos remain near the bottom and use rocks as cover (Kynard *et al.*, 2005). Excess fine sediments can compromise successful development by burying already-deposited eggs, reducing interstitial dissolved oxygen available for eggs (Scrivener and Brownlee, 1989), or filling areas used by embryos for cover.

Thus, Southern DPS eggs or embryos may be taken due to habitat-altering activities that increase input of fine sediments or runoff into spawning or rearing habitat. The effect that increased input of fine sediments or runoff has at the individual, population and species levels will depend on the temporal and spatial extent of habitat change. The only way to determine this is to analyze particular activities on a case-by-case basis.

The filling in or isolation of stream channels, side channels, and intermittent waters may destroy or block access to rearing habitats, or impede or delay downstream migration by trapping larvae and juveniles that have entered these areas. Activities that fill in or isolate waters include, but are not limited to, the installation of tide gates, culverts, and debris- or sediment-trapping road crossing structures. These activities and their effects are a concern for listed salmon and steelhead and may also affect larval and juvenile Southern DPS fish. However, we currently lack the information needed to quantitatively assess these effects. Although relatively large numbers of juveniles have been collected in shallow areas of the Santa Clara shoal in the Sacramento-San Joaquin Delta (Radtke, 1966), the use of stream channels, side channels, and intermittent waters as rearing habitat by green sturgeon larvae and juveniles has not been documented. Information regarding the use of these habitats by early life stages of green sturgeon is needed.

Direct removal or alteration of physical structures essential to the integrity and function of the Southern DPS's spawning or rearing habitat, including rocks, soil, gravel, and vegetation, may adversely affect the growth and survival of larvae and juveniles. Green sturgeon likely use specific substrate types at different life stages, but observations of early life stages of green sturgeon in the field are lacking. Studies suggest that spawning most likely occurs over cobble substrates that provide crevices and cover for eggs (Kynard *et al.*, 2005; Nguyen and Crocker, 2006). However, in a laboratory study of substrate use by post-hatch larval green sturgeon, growth and survival was greatest in flat slate-rock substrates that provided cover and sufficient foraging opportunities (Nguyen and Crocker, 2006). Survival was low in cobble substrates, because larvae became trapped in crevices and died; whereas in sand substrates, the cause of lower survival and growth was attributed to the ingestion of sand particles similar in size to food particles (Nguyen and Crocker, 2006). Juveniles

likely use deep pool habitats with rock structure during the winter (Kynard *et al.*, 2005). Removal or alteration of these physical structures (i.e. cobble for spawning and egg development; flat rock for larval rearing; deep pool habitats with rock structure for juvenile rearing) may reduce spawning or rearing success rates. Information regarding the use of spawning habitats by Southern DPS early life stages and the effects of removing or altering physical components of Southern DPS spawning habitat on recruitment success is needed.

The construction and maintenance of dams and water diversion structures may impede or delay downstream migration and alter habitats important to larval and juvenile stages of the Southern DPS. Dams and water diversions may block downstream migration of larvae and juveniles, unless fish transport or bypass facilities exist. Passage across dams and water diversion structures may also disorient or injure larvae and juveniles and make them more vulnerable to predation, as has been observed for juvenile salmonids at RBDD (Bigelow and Johnson, 1996; Gaines and Martin, 2002). The actual construction of dams and water diversion structures may cause increased erosion and sedimentation and disrupt or alter physical structures in spawning or rearing habitats, with effects as described in the previous paragraphs.

While existing laws require mining, timber harvest, and other resource use plans to address erosion and other adverse impacts on stream habitats, these laws may not be adequate to protect the Southern DPS. Additional measures that would help reduce potential adverse impacts on Southern DPS fish are: (1) protection of riparian habitat by limiting activities that cause erosion, sediment input or runoff into streams, or roadway and other linear development near or across streams; (2) construction of fish protection and passage facilities; and (3) limiting the temporal and/or spatial scopes of habitat alteration activities that occur in and near spawning and rearing locations.

#### *Habitat Restoration*

The primary purpose of habitat restoration is to restore natural aquatic or riparian habitat conditions or processes over the long-term. Specifically, we define habitat restoration as the process of reestablishing a self-sustaining habitat that closely resembles natural conditions in terms of structure and function for the Southern DPS. A variety

of habitat-altering activities such as barrier removal or modification to restore natural water flows, river and estuarine bed restoration, natural bank protection, restoration of native vegetation, removal of non-native species, and removal of contaminated sediments have been used to reestablish natural river and estuarine functions over the long-term. Although take of green sturgeon could potentially occur during the course of completing restoration activities, we do not have evidence that these types of activities have taken the Southern DPS or a surrogate species. It is likely that these activities are important to the conservation and recovery of the Southern DPS.

#### *Entrainment and Impingement Risks*

The operation of water diversions, power generating projects, and dredging activities pose entrainment and impingement threats to all life stages of the Southern DPS. We define entrainment to mean the incidental trapping of any life stage of fish within waterways or structures that carry water being diverted for anthropogenic use. We define impingement to mean the entrapment of any life stage of fish on the outer part of any structure (e.g., intake structures, screening devices) that separates water traveling a natural course of passage from water that is being diverted for anthropogenic use. Unscreened water diversions number in the hundreds to thousands in the Sacramento River and the Sacramento-San Joaquin Delta (Herren and Kawasaki, 2001). Factors that determine the entrainment risk of fish at diversions include the location and size of fish. A study of fish entrainment at an unscreened diversion in the Sacramento River documented entrainment of fish ranging in size from 9 to 59 mm fork length (FL) in July 2000 and 2001 (Nobriga *et al.*, 2004). Green sturgeon were not among the species documented in the study, but Southern DPS larvae and small juveniles within the size range of 9–59 mm FL occur in the Sacramento River at that time of year and are believed to also be at risk of entrainment at unscreened diversions. Entrainment of juvenile green sturgeon has been documented at the state and Federal fish facilities in the south Sacramento-San Joaquin Delta, where fish are salvaged before they enter the pumps (Adams *et al.*, 2006). Programs to install fish screens at water diversions are being implemented and many major diversions have already been screened. Installation of fish screens, construction of bypass and other fish protection facilities (Bigelow and Johnson, 1996;

Gaines and Martin, 2002), adjustments in the timing of operations, and continuation of fish salvage operations, where applicable, would help minimize and mitigate entrainment of Southern DPS fish at water diversions.

Evidence exists for the impingement of green sturgeon in the operation of coastal power plants using cooling water intake systems. Two juvenile green sturgeon were impinged and died on cooling water intake screens at the now retired Contra Costa Plant Units 1–5 in 1978–1979 and at the Moss Landing Power Plant in 2006 (C. Raifsnider and J. Steinbeck, Tenera Environmental, 2006, personal communication). Current conservation efforts include the installation of screens to reduce entrainment, studies of fish impingement and entrainment at power plants, and laws that require the minimization of fish impingement and entrainment. Other actions that can be taken to reduce impingement and entrainment include altering the time of day when water intake pumps are operated, altering the velocity of water intake, and the use of alternative cooling systems that do not require water intake.

Dredging operations in freshwater rivers, bays, and estuaries where Southern DPS fish occur may pose entrainment risk. Although entrainment of green sturgeon in dredging operations has not been documented, the effects could be significant. Approximately two thousand juvenile white sturgeon were entrained during operation of a large suction dredge in the lower Columbia River (Buell, 1992). Juvenile green sturgeon would be expected to face similar entrainment risks from dredging operations because they are also bottom-oriented and occur in habitats similar to white sturgeon. Long-term management strategies for San Francisco Bay dredging operations have established regional environmental work windows, or periods of time when certain fish species are not likely to be present in a location. Currently, it is believed that Southern DPS juveniles reside in San Francisco, Suisun, and San Pablo bays year-round so environmental work windows will likely not be effective in reducing the risks of dredging operations to the Southern DPS in these locations. However, the use of specific types of dredging equipment with modified designs would reduce the entrainment risk to Southern DPS fish from dredging operations.

#### *Pesticides and Discharge of Pollutants*

The application of pesticides adjacent to or within waterways that contain any life stage of the Southern DPS may adversely affect their growth and

reproductive success. Several pesticides have been detected in the Sacramento River Basin at levels that are likely to be harmful to aquatic life (Domagalski *et al.*, 2000). The accumulation of industrial chemicals and pesticides such as polychlorinated biphenyls (PCBs), dichloro-diphenyl-trichloroethanes (DDTs), and chlordanes in white sturgeon gonad, liver, and muscle tissues affects growth and reproductive development and results in lower reproductive success (Fairey *et al.*, 1997; Foster *et al.*, 2001a; Foster *et al.*, 2001b; Kruse and Scarnecchia, 2002; Feist *et al.*, 2005; Greenfield *et al.*, 2005). Green sturgeon are believed to experience similar risks from contaminants, although their exposure may be reduced because a greater proportion of their subadult and adult lives are spent in marine waters (70 FR 17386, April 6, 2005). Pesticides may also indirectly affect green sturgeon through effects on their prey species. For example, green sturgeon are believed to enter Willapa Bay to feed on burrowing ghost shrimp (*Neotrypaea californiensis*), which have declined in abundance due to the deliberate application of carbaryl (Moser and Lindley, 2006).

The discharge or dumping of toxic chemicals or other pollutants into waters and areas where Southern DPS fish occur would be expected to reduce their growth and reproductive success. Pollutants including mercury, selenium, and arsenic have been detected in white sturgeon gonad, liver, and muscle tissues and are believed to affect growth, reproductive development, and reproductive success (Fairey *et al.*, 1997; Davis *et al.*, 2002; Kruse and Scarnecchia, 2002; Greenfield *et al.*, 2005; Webb *et al.*, 2006). Again, the effects on green sturgeon are likely to be similar.

Under the Federal Clean Water Act, acceptable levels for contaminants in waterways have been established by the States and the U.S. Environmental Protection Agency (EPA). Entities must also obtain National Pollutant Discharge Elimination System (NPDES) permits to discharge contaminants. However, NPDES permits are not required for irrigated agriculture and agricultural stormwater runoff. Furthermore, the national standards for use of pesticides and toxic substances may not be conservative enough to adequately protect the Southern DPS as was found for listed salmonids in recent draft and final jeopardy biological opinions issued by NMFS to the EPA (NMFS 1998, NMFS 2000, NMFS 2008). Thus, programs to aid agricultural producers in meeting NMFS-imposed water

quality standards may be required to minimize adverse impacts on the Southern DPS.

#### *Non-native Species Introductions*

Non-native species are a continuing problem in freshwater rivers and coastal bays and estuaries and may affect the Southern DPS through trophic interactions. Introduced species, such as striped bass in the Sacramento River and the Sacramento-San Joaquin Delta, may prey on green sturgeon. Non-native species may also replace prey species of green sturgeon and result in greater bioaccumulation of contaminants. For example, *Potamocorbula amurensis*, a non-native bivalve, has become widespread in the San Francisco Bay and the Sacramento-San Joaquin Delta and has replaced other common prey items for white sturgeon. *P. amurensis* is an efficient bioaccumulator of selenium, a reproductive toxin that causes deformities in embryos and reduced hatchability of eggs, and has been linked with increased selenium levels in white sturgeon (Linville *et al.*, 2002). *P. amurensis* has also been identified in the gut contents of at least one green sturgeon (CDFG, 2002). Non-native species may also alter the Southern DPS' habitat or compete with the Southern DPS for space or food. Although existing laws prohibit the release of non-native species into the environment, accidental and intentional introduction of non-native species remains a problem. Eradication programs for non-native species, increased public education and outreach, and increased fines or penalties for the release of non-native species would help to alleviate this problem.

#### **Proposed 4(d) Protective Regulations for the Southern DPS**

We propose to apply the prohibitions listed under ESA sections 9(a)(1)(A) through 9(a)(1)(G) for the Southern DPS, including all the ESA section 9(a)(1)(B) and 9(a)(1)(C) prohibitions (the "take prohibitions") except for specific activities described below (see Exceptions, Criteria for Exceptions, and Reporting Requirements). ESA section 9(a)(1)(A) states that it is unlawful to import or export endangered species into or from the United States; ESA section 9(a)(1)(B) states that it is illegal to take endangered species within the United States or the territorial sea of the United States; ESA section 9(a)(1)(C) states that it is illegal to take endangered species upon the high seas; ESA section 9(a)(1)(D) states that it is illegal to possess, sell, deliver, carry, transport, or ship, by any means whatsoever,

endangered species taken in violation of 9(a)(1)(A) and 9(a)(1)(C); ESA section 9(a)(1)(E) states that it is illegal to deliver, receive, carry, transport, or ship in interstate or foreign commerce by any means whatsoever and in the course of a commercial activity, endangered species; ESA section 9(a)(1)(F) states that it is illegal to sell or offer for sale in interstate or foreign commerce, endangered species; and ESA section 9(a)(1)(G) states that it is illegal to violate any regulation pertaining to endangered species or to any threatened species of fish or wildlife listed pursuant to section 4 of the ESA and promulgated by the Secretary pursuant to authority provided by the ESA.

These prohibitions are necessary and advisable for the conservation of the Southern DPS because human "take" via activities including, but not limited to, detrimental habitat alteration, modification, and curtailment; fisheries catch and bycatch; application of pesticides, toxic chemicals, or other pollutants adjacent to or within waterways; entrainment or impingement of eggs or fish during water diversion operations, dredging, or power generation; unnecessary collection or handling; and introduction of non-native species that disrupt trophic pathways, has contributed to the decline of the Southern DPS and is likely to impede its conservation and recovery.

#### **Exceptions, Criteria for Exceptions, and Reporting Requirements**

We propose exceptions to the ESA section 9(a)(1)(B) and 9(a)(1)(C) prohibitions (the "take prohibitions") for specific activities. These proposed exceptions encompass specific activities that may be excluded from the take prohibitions for the Southern DPS through the relatively informal coordination process described below. In determining that it is necessary and advisable to not impose take prohibitions on certain activities, we are mindful that new information may require a reevaluation of that conclusion at any time. For any of the exceptions to the take prohibitions described below, we would evaluate on a regular basis the effectiveness of the activities in conserving and protecting the Southern DPS. If the activities are not effective in conserving and protecting the Southern DPS, we would identify ways in which the activities need to be altered or strengthened. For habitat-related exceptions to the take prohibitions, changes may be required if the activities are not achieving desired habitat functionality or the habitat is not supporting population productivity levels needed to conserve the Southern

DPS. If the responsible agency does not make changes to respond adequately to the new information, we would publish notification in the **Federal Register** announcing the intention to impose take prohibitions on those activities. Such an announcement would provide for a comment period of not less than 30 days, after which we would make a final determination whether to extend the ESA section 9(a)(1)(B) and (C) take prohibitions to the activities. We propose that take of the Southern DPS not be prohibited during the course of the following activities:

(1) Federal, state or private-sponsored research or monitoring activities if they adhere to all of the following: (a) the activity must comply with required state reviews or permits; (b) the research or monitoring activity must be directed at the Southern DPS and not be incidental to research or monitoring of another species; (c) take of live mature adults in the lower Feather River from the confluence with the Sacramento River to the Oroville Dam (rkm 116), the lower Yuba River from the confluence with the Feather River to the Daguerre Dam (rkm 19), or Suisun, San Pablo, and San Francisco Bays or the Sacramento-San Joaquin Delta from the Golden Gate Bridge up into the Sacramento River to Keswick Dam (rkm 483) may only occur from July 1 through March 1 so as to substantially increase the likelihood that uninterrupted upstream spawning migrations of adults will occur; (d) take must be non-lethal; (e) take involving the removal of any life stage of the Southern DPS from the wild must not exceed 60 minutes; (f) take must not involve artificial spawning or enhancement activities; (g) a description of the study objectives and justification, a summary of the study design and methodology, estimates of the total non-lethal take of Southern DPS fish anticipated, estimates of incidental take of other ESA listed species anticipated and proof that those takes have been authorized by NMFS or the USFWS, identification of funding sources, and a point of contact must be reported to NMFS at least 60 days prior to the start of the study, or for ongoing studies within 60 days after publication of the final rule; (h) reports that include the total number of Southern DPS and any other ESA listed species taken, information that supports that take was non-lethal, and a summary of the project results must be submitted to NMFS on a schedule to be determined by NMFS staff; (i) research or monitoring that involves action, permitting or funding by a federal agency must still comply with the requirements of ESA section

7(a)(2) in order to ensure that the action will not jeopardize the continued existence of the threatened Southern DPS.

(2) Enforcement activities when an employee of NMFS, acting in the course of his or her official duties, takes the Southern DPS without a permit, if such action is necessary for purposes of enforcing the ESA or its implementing regulations.

(3) Emergency fish rescue and salvage activities that include aiding sick, injured, or stranded fish, disposing of dead fish, or salvaging dead fish for use in scientific studies, if they adhere to all of the following: (a) the activity must comply with required state or other Federal reviews or permits; (b) activities may only be conducted by an employee or designee of NMFS or the U.S. Fish and Wildlife Service (USFWS), any Federal land management agency, or California Department of Fish and Game (CDFG), Oregon Department of Fish and Wildlife (ODFW), Washington Department of Fish and Wildlife (WDFW), or Alaska Department of Fish and Game (ADFG); (c) the emergency rescue may only occur because of situations that result from natural disasters, national defense, or security emergencies (see 50 CFR 402.05); (d) the emergency rescue must benefit the Southern DPS; (e) a report must be submitted to NMFS that includes, at a minimum, the number and status of fish handled and the location of rescue and/or salvage operations within 30 days after conducting the emergency rescue.

(4) Habitat restoration activities, including barrier removal or modification to restore water flows, riverine or estuarine bed restoration, natural bank stabilization, restoration of native vegetation, removal of non-native species, or removal of contaminated sediments, that reestablish self-sustaining habitats for the Southern DPS, if they adhere to all of the following: (a) compliance with required state and Federal reviews and permits; (b) a detailed description of the restoration activity sent to NMFS at least 60 days prior to the start of the restoration project which includes: the geographic area affected; when activities will occur; how they will be conducted; and the severity of direct, indirect, and cumulative impacts of activities on the Southern DPS; identification of funding sources; demonstration that all state and federal regulatory requirements have been met; a description of methods used to ensure that the likelihood of survival or recovery of the listed species is not reduced; a plan for minimizing and mitigating any adverse impacts to Southern DPS spawning or rearing

habitat; an estimate of the amount of incidental take of the listed species that may occur and a description of how that estimate was made; a plan for effective monitoring and adaptive management; a pledge to use best available science and technology when conducting restoration activities; and a point of contact; (c) progress reports that include the total number of Southern DPS taken, information regarding whether the take was lethal or non-lethal, a summary of the status of the project, and any changes in the methods being employed, must be submitted to NMFS on a schedule to be determined by NMFS staff; (d) activities that involve action, permitting or funding by a federal agency must still comply with the requirements of ESA section 7(a)(2) in order to ensure that the action will not jeopardize the continued existence of the threatened Southern DPS.

#### **Exemptions Provided by NMFS-approved ESA 4(d) Programs**

We propose exemptions from the take prohibitions for certain activities included within a NMFS-approved 4(d) program. Activities included in a 4(d) program would be excused from the take prohibitions for the Southern DPS through a formal NMFS 4(d) program approval process described below.

##### *ESA 4(d) Program for Commercial and Recreational Fishery Management*

Take of green sturgeon in commercial and recreational fisheries activities would be allowed if fisheries activities were conducted under approved Fisheries Management and Evaluation Plans (FMEPs). We expect that, in many cases, fisheries will have acceptably small impacts on the threatened Southern DPS as long as state fishery management programs are specifically tailored to meet certain criteria. NMFS-approved FMEPs must address limiting take of green sturgeon in order to protect the listed entity, the Southern DPS. We consider this necessary because discrimination between the non-listed Northern DPS and listed Southern DPS, via gear specificity, visual indicators, spatial distribution, etc., is not currently possible. In order for NMFS to exempt commercial or recreational fishing activities from the take prohibitions, an FMEP must: (1) prohibit retention of green sturgeon (i.e. zero bag limit); (2) set maximum incidental take levels; (3) include measures to minimize incidental take of green sturgeon (e.g., temporal/spatial restrictions, size, gear); (4) provide a biologically based rationale demonstrating that the incidental take management strategy will not significantly reduce the

likelihood of survival or recovery of the Southern DPS; (5) include effective monitoring and evaluation plans; (6) provide for evaluating monitoring data and making revisions to the FMEP; (7) provide for effective enforcement and education; and (8) report the amount of incidental take and summarize the effectiveness of the FMEP to NMFS on a biannual basis. If we find that an FMEP meets these criteria, we would issue a letter of concurrence to the State that sets forth the terms of the FMEP's implementation and the duties of the parties pursuant to the FMEP.

Section 9(a)(1)(B) and (a)(1)(C) take prohibitions would not apply to ongoing commercial and recreational fisheries activities after publication of the final rule, for up to 120 days, if a letter of intent to develop an FMEP addressing green sturgeon has been received by NMFS within 30 days after the final rule is published in the **Federal Register**. The exemption will be suspended if the letter of intent is rejected without further review of an FMEP. If the letter of intent is received within 30 days of publication of the final 4(d) rule in the **Federal Register**, a final FMEP must be received by NMFS within 120 days from the date of receipt of the letter of intent. Ongoing commercial and recreational fisheries activities may continue until NMFS issues a letter of concurrence (or denial) for final FMEPs.

Once an FMEP has been submitted to NMFS for review, NMFS will: (1) provide a public comment period ( $\geq 30$  days) before approval of new or amended FMEPs; (2) provide a letter of concurrence for approved FMEPs that specifies the implementation and reporting requirements; (3) evaluate FMEPs on a regular basis and identify changes that would improve their effectiveness; and (4) provide a public comment period ( $\geq 30$  days) before withdrawing approval of an FMEP.

#### *ESA 4(d) Program for Tribal Fishery Management*

Fishery harvest or other activities conducted by a tribe, tribal member, tribal permittee, tribal employee, or tribal agent in Willapa Bay, WA, Grays Harbor, WA, Coos Bay, OR, Winchester Bay, OR, Humboldt Bay, CA, and any other area where tribal treaty fishing occurs are eligible to obtain take authorization via the same method outlined in the NMFS final rule for authorizing take of threatened salmon and steelhead for actions under tribal resource management plans (July 10, 2000; 65 FR 42481). This method has been modified below for the Southern DPS. We consider current tribal fishing activities to have acceptably small

impacts on the threatened Southern DPS and propose that if the tribes, either singly or jointly, develop tribal resource management plans for the Southern DPS, or incorporate the Southern DPS into existing tribal resource management plans, that current and future tribal activities are not likely to appreciably reduce the likelihood of survival and recovery of the species.

A tribe intending to exercise a tribal right to fish or undertake other resource management actions that may impact the threatened Southern DPS could create a tribal resource management plan (Tribal Plan) that would assure that those actions would not appreciably reduce the likelihood of survival and recovery of the species. The Secretary would stand ready to the maximum extent practicable to provide technical assistance to any tribe that so requests in examining impacts on the listed Southern DPS and in the development of Tribal Plans that meet tribal management responsibilities and needs. In making a determination whether a Tribal Plan will appreciably reduce the likelihood of survival and recovery of the threatened Southern DPS, the Secretary, in consultation with the tribe, would use the best available scientific and commercial data (including careful consideration of any tribal data and analysis) to determine the Tribal Plan's impact on the biological requirements of the species. The Secretary would also assess the effect of the Tribal Plan on survival and recovery in a manner consistent with tribal rights and trust responsibilities. Before making a final determination, the Secretary would seek comment from the public on his pending determination whether or not implementation of a Tribal Plan will appreciably reduce the likelihood of survival and recovery of the listed Southern DPS. The Secretary would publish notification in the **Federal Register** of any determination regarding a Tribal Plan and the basis for that determination.

#### *ESA 4(d) Program for Scientific Research and Monitoring Activities*

State-coordinated research activities for scientific research or enhancement purposes that do not fall into the exception category described above (see Exceptions, Criteria for Exceptions, and Reporting Requirements) may receive an exemption from the take prohibitions for the Southern DPS for activities included in a state-sponsored, ESA-compliant, scientific research program between state fishery agencies (i.e., CDFG, ODFW, WDFW, or ADFG) and NMFS, hereafter referred to as a state 4(d) research program. Activities

conducted as part of a state 4(d) research program must meet existing state and federal laws and regulations and would include research and monitoring projects conducted by state employees or by recipients of state fishery agency-issued permits (including Federal and non-Federal entities), that directly or incidentally take Southern DPS green sturgeon. We find that in carrying out their responsibilities to manage state fisheries, state agencies are conducting or sponsoring research vital for improving our understanding of the status and risks facing the Southern DPS and other listed species that occur in overlapping habitat, and provide critical information for assessing the effectiveness of current and future management practices.

State 4(d) research programs have been developed and implemented in California, Oregon, and Washington for listed West coast salmon and steelhead and are consistent with ESA requirements for research-related take of these listed species. The Southern DPS would most likely be incorporated into the existing state 4(d) research programs established for listed salmon and steelhead. Otherwise, the state would be required to prepare a program and submit it to NMFS for approval. NMFS may approve the program or return the program to the state agency for revision.

In general, we conclude that as long as state biologists and cooperating agencies carefully consider the benefits and risks of activities included in a state 4(d) research program, such programs would help streamline the take authorization process for researchers, state agencies, and NMFS by allowing state fishery agencies to maintain primary responsibility for coordination and oversight of research activities. Each year, researchers would be required to submit research applications to the state fishery agency preferably through the NMFS online application website Authorizations and Permits for Protected Species (APPS) at <https://apps.nmfs.noaa.gov>. Research applications must include, at a minimum, the following information: (1) an estimate of the total direct or incidental take of Southern DPS fish that is anticipated; (2) a description of the study design and methodology; (3) a justification for take of Southern DPS fish and the techniques to be employed; and (4) a point of contact. The state agency would have access, via NMFS, to the submitted applications, evaluate and determine which projects are eligible for inclusion under the program, and approve or deny individual project applications. Once the state agency

review is complete, the state agency would be required to provide for NMFS' review and approval a list of project applications approved for possible inclusion in a 4(d) research program for the coming year. After our review of the applications and follow-ups with the researchers to address concerns if necessary, we would analyze effects of the activities on the Southern DPS. Finally, we would complete the ESA section 7 consultation and NEPA documentation and issue an approval letter to the state fishery agency confirming that the research activities covered within the 4(d) research program are exempt from the ESA take prohibitions. A section 10 permit is not issued. Researchers have to comply with the conditions of the 4(d) research program and must submit an annual report, preferably through the NMFS online application website Authorizations and Permits for Protected Species (APPS) at <https://apps.nmfs.noaa.gov>. The annual report must include, for each project: (1) a summary of the number of green sturgeon taken directly or incidentally; and (2) a summary of the results of the project, in order for NMFS to evaluate the effects of the research project on the Southern DPS. We would continue to work with the state fishery agencies to ensure authorized research involving listed Southern DPS fish is both coordinated and conducted in a manner

that does not jeopardize the conservation and recovery of the Southern DPS.

Section 9(a)(1)(B) and 9(a)(1)(C) take prohibitions would not apply to ongoing state-supported scientific research and enhancement activities seeking take authorization of the Southern DPS fish through a state 4(d) program, if the above information is provided to NMFS, preferably through the NMFS online application website Authorizations and Permits for Protected Species (APPS) at <https://apps.nmfs.noaa.gov>, within 120 days after publication of the final 4(d) rule. The take prohibitions would take effect if the state 4(d) program package is rejected as insufficient or is denied. If the state 4(d) research program package is received no later than 120 days after publication of the final 4(d) rule, ongoing state-supported scientific research activities may continue until NMFS issues a written decision of approval or denial.

#### Take Authorizations Provided By ESA Sections 7 or 10

Federally funded, authorized, or implemented activities that may require take authorization (see Proposed 4(d) Protective Regulations for the Southern DPS), and are not covered under Exceptions, Criteria for Exceptions, and Reporting Requirements or Exemptions Provided by NMFS-approved 4(d) Programs above, will be examined on a

case-by-case basis through interagency consultation as prescribed by ESA section 7. All other activities (i.e., those not federally funded, authorized, or implemented) that may require take authorization, and are not covered under Exceptions, Criteria for Exceptions, and Reporting Requirements or Exemptions Provided by NMFS-approved 4(d) Programs above, will be examined on a case-by-case basis as prescribed by ESA section 10.

Federal, state and private-sponsored research activities for scientific research or enhancement purposes that are not covered under Exceptions, Criteria for Exceptions, and Reporting Requirements or Exemptions Provided by NMFS-approved 4(d) Programs above, may take Southern DPS fish pursuant to the specifications of an ESA section 10 permit. Section 9(a)(1)(B) and (a)(1)(C) take prohibitions would not apply to ongoing research activities if an application for an ESA section 10 (a)(1)(A) permit is received by NMFS no later than 120 days after publication of the final 4(d) rule. The take prohibitions would take effect if the permit application is rejected as insufficient or a permit is denied. If the permit application is received no later than 120 days after publication of the final 4(d) rule, ongoing research activities may continue without take prohibitions until NMFS issues or denies a permit.

TABLE 1. EVALUATION OF ACTIVITIES THAT MAY OCCUR THROUGHOUT THE AREA AFFECTED BY THE PROPOSED PROHIBITIONS FOR SOUTHERN DPS FISH, EGGS OR LARVAE.

Activity	Take	Take of Surrogate Species	Protective/Conservation Measures or Benefits	Take Authorization Necessary	Methods of Take Authorization	
					ESA section 7 or 10	4(d) Program
Fishing						
Commercial	Y		Y	Y	Y	Y
Recreational	Y		Y	Y	Y	Y
Tribal	Y		Y	Y	Y	Y
Poaching	N	Y	N	N/A	N	N
Collection or Handling						
Research/monitoring						
Federal, State or Private-sponsored (compliant with Exceptions)	Y		Y	N		
State-sponsored (outside scope of Exceptions)	Y		Y	Y	Y	Y
Federal or Private-sponsored (outside scope of Exceptions)	Y		Y	Y	Y	N
Emergency Rescue (compliant with Exceptions)	N	Y	Y	N		

TABLE 1. EVALUATION OF ACTIVITIES THAT MAY OCCUR THROUGHOUT THE AREA AFFECTED BY THE PROPOSED PROHIBITIONS FOR SOUTHERN DPS FISH, EGGS OR LARVAE.—Continued

Activity	Take	Take of Surrogate Species	Protective/Conservation Measures or Benefits	Take Authorization Necessary	Methods of Take Authorization	
					ESA section 7 or 10	4(d) Program
Emergency Rescue (outside scope of Exceptions)	N	Y	N	Y	Y	N
<b>Detrimental Habitat-Altering Activities</b>						
<b>Activities that Eliminate, Obstruct, or Delay Passage</b>						
Dam installation, repair, modification, operation	Y		Y	Y	Y	N
Diversion installation, repair, modification, operation	Y		Y	Y	Y	N
<b>Activities that Destroy, Modify, or Curtail Spawning or Rearing Habitat</b>						
Input of fine sediments/runoff	N	Y	Y	Y	Y	N
Dam installation, repair, modification, operation	Y		Y	Y	Y	N
Diversion installation, repair, modification, operation	Y		Y	Y	Y	N
Filling/isolation of channels/intermittent waters	N	N	Y	Y	Y	N
Removal/alteration of physical structure that provides spawning/rearing habitat	N	N	Y	Y	Y	N
<b>Habitat Restoration (compliant with Exceptions)</b>						
Barrier removal/modification to restore flows	N	N	Y	N		
Riverine or estuarine bed restoration	N	N	Y	N		
Natural bank protection	N	N	Y	N		
Restoration of native vegetation	N	N	Y	N		
Removal of non-native species	N	N	Y	N		
Removal of contaminated sediments	N	N	Y	N		
Habitat Restoration (outside scope of Exceptions)	N	N	N	Y	Y	N
<b>Entrainment/Impingement</b>						
Water diversions	Y		Y	Y	Y	N
Power generating projects	Y		Y	Y	Y	N
Dredging	N	Y	Y	Y	Y	N
Pesticide/Pollutant Discharge	N	Y	Y	Y	Y	N
Non-native Species Introductions	N	Y	Y	N/A	N	N

Note: Evidence of take of the Southern DPS during the course of an activity is indicated (yes or no; Y or N); if there is no such evidence, then evidence of take of a surrogate species is indicated (Y or N). Existence of protective/conservation measures to minimize take of Southern DPS fish during the course of the activity or to benefit the Southern DPS is indicated (Y or N). Based on best available information and expert opinion, whether an activity requires take authorization (Y or N) or is illegal according to other laws and therefore cannot be authorized (N/A), and whether methods for allowing take resulting from a particular activity exist through ESA sections 7 or 10 or through a proposed ESA section 4(d) Program (Y or N). This is not an exhaustive list of all activities that occur throughout the area affected by the proposed take prohibitions. Please see *Proposed 4(d) Protective Regulations for the Southern DPS* for the full range of activities for which NMFS is proposing to prohibit take.

Under section 9(b)(1) of the ESA, Southern DPS fish held in captivity or a controlled environment prior to the ESA listing are exempt from the prohibitions of section 9(a)(1)(A) and (a)(1)(G) of the ESA and would therefore also be exempt from the prohibitions of

this proposed regulation, provided that holding and any subsequent holding or use of the fish is not for commercial activity. The burden of proof that Southern DPS fish were taken prior to listing lies with the individual holding the animals. The prohibitions of this

proposed regulation would, however, apply to any progeny of Southern DPS fish taken prior to listing.

#### Summary

We propose to apply the section 9 take prohibitions to the Southern DPS,

while providing exceptions for some activities (i.e., some types of research/monitoring, enforcement, emergency rescue/salvage, and habitat restoration; see Exceptions, Criteria for Exceptions, and Reporting Requirements) that NMFS finds will not impede, and in most cases will promote, the conservation of the species. However, if the activity is federally funded, authorized or implemented it will still be subject to NMFS review under the ESA jeopardy standard (i.e. ESA section 7(a)(2)). Apart from the subset of activities defined in Exceptions, Criteria for Exceptions, and Reporting Requirements above, if the Southern DPS is anticipated to be taken during the course of an activity, several methods may be pursued to obtain take authorization depending on the specific circumstances of the activity. For federally funded, authorized or implemented activities, the traditional method of seeking take coverage through ESA sections 7 or 10 exists. For activities that are not federally funded, authorized or implemented, take authorization may be obtained through ESA section 10, by establishing a NMFS-approved 4(d) program (i.e., for commercial or recreational fishing activities or state-sponsored research outside the scope of those activities defined in Exceptions, Criteria for Exceptions, and Reporting Requirements) that adequately protects the Southern DPS, or by developing a tribal resource management plan that will not appreciably reduce the likelihood of survival and recovery of the Southern DPS (see Exemptions Provided by NMFS-approved ESA 4(d) Programs). Take of the Southern DPS due to poaching and non-native species introductions is illegal according to existing state and/or federal laws, thus no method of take authorization is being proposed for these activities.

#### Public Comments Solicited

We invite comments and suggestions from all interested parties regarding the proposed protective regulations for the Southern DPS under section 4(d) of the ESA (see ADDRESSES). Data, information, and comments that are accompanied by supporting documentation such as maps, logbooks, bibliographic references, personal notes, and/or reprints of pertinent publications are helpful and appreciated.

#### Public Hearing

The ESA provides for a public hearing on this proposal, if requested. Requests must be filed by the date specified in the DATES section above. Such requests must be made in writing and addressed

to the Chief, Protected Resources Division, Attn: Melissa Neuman, Southwest Region, National Marine Fisheries Service, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213.

#### Peer Review

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review (Peer Review Bulletin) establishing minimum peer review standards, a transparent process for public disclosure, and opportunities for public input. The Peer Review Bulletin, implemented under the Information Quality Act (Public Law 106 554), is intended to provide public oversight on the quality of agency information, analyses, and regulatory activities. The text of the Peer Review Bulletin was published in the **Federal Register** on January 14, 2005 (70 FR 2664). The Peer Review Bulletin requires Federal agencies to subject "influential" scientific information to peer review prior to public dissemination. Influential scientific information is defined as "information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions," and the Peer Review Bulletin provides agencies broad discretion in determining the appropriate process and level of peer review. The Peer Review Bulletin establishes stricter standards for the peer review of "highly influential" scientific assessments, defined as information whose "dissemination could have a potential impact of more than \$500 million in any one year on either the public or private sector or that the dissemination is novel, controversial, or precedent-setting, or has significant interagency interest." We do not consider the scientific information underlying the proposed protective regulations to constitute influential scientific information as defined in the Peer Review Bulletin. The information is not novel; similar information for listed salmonids whose range substantially overlaps with that of the Southern DPS has been used in support of protective regulations that have been in existence for a number of years. Therefore the agency expects the information to be non-controversial and have minimal impacts on important public policies or private sector decisions.

#### References

A complete list of the references used in this proposed rule is available upon

request (see ADDRESSES) or via the internet at <http://www.swr.noaa.gov>.

#### Classification

##### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601B612) was designed to ensure that agencies carefully assess whether aspects of a proposed regulatory scheme (record keeping, safety requirements, etc.) can be tailored to be less burdensome for small businesses while still achieving the agency's statutory responsibilities. When an agency proposes regulations, the Regulatory Flexibility Act (RFA) (5 U.S.C. 601B612) requires the agency to prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) that describes the impact of the proposed rule on small businesses, nonprofit enterprises, local governments, and other small entities, unless the agency is able to certify that the action will not have a significant impact on a substantial number of small entities. This proposed ESA 4(d) rule has specific requirements for regulatory compliance and sets an enforceable performance standard (do not take listed fish) when conducting specific activities unless that activity is within a carefully circumscribed set of activities on which NMFS proposes not to impose the take prohibitions. Hence, the universe of entities reasonably expected to be directly or indirectly impacted by the prohibition is broad.

Based on the language of the proposed 4(d) rule, as well as a review of existing section 7 consultations for the Southern DPS of green sturgeon and co-existing salmon and steelhead species, the IRFA identified the following activities that may be affected by this proposed rule: commercial, recreational and tribal fisheries; dams and water diversions; power production (electric services and gas distribution); crop agriculture and point source pollutants (NPDES-permitted activities); habitat-altering activities; and in-water construction and dredging activities. A great deal of uncertainty exists with regard to how potentially regulated entities will attempt to avoid take of the Southern DPS. This is caused by two factors: relatively little data exist on green sturgeon abundance and behavior, and NMFS has a short history of managing the Southern DPS. In addition, the spatial distribution of the Southern DPS overlaps nearly entirely with habitat for salmon and steelhead species. Several key variables, such as whether current fish passage facilities and fish screens designed to protect salmon species will be considered adequate to provide

passage for the Southern DPS over the long term, remain undetermined at this time. Thus, while baseline protections are expected to be afforded to the Southern DPS on behalf of salmon and steelhead species, the degree to which incremental measures would be required for the Southern DPS has not been determined. As such, the IRFA does not provide estimates of total costs of conservation measures likely to be undertaken for the Southern DPS. Instead, the analysis characterizes potential impacts on affected industries.

In formulating this proposed rule, we considered five alternative approaches, described in more detail in the IRFA. These are: (1) a No Action Alternative where no ESA section 9(a)(1) prohibitions or any other protective regulations are applied to the Southern DPS; (2) a Full Action Alternative where all ESA section 9(a)(1) prohibitions are applied to the Southern DPS; (3) Alternative A where the prohibitions listed under ESA section 9(a)(1)(A) and 9(a)(1)(D) through 9(a)(1)(G) are applied to the Southern DPS and the take prohibitions (ESA section 9(a)(1)(B) and 9(a)(1)(C)) are applied to specific categories of activities that either cause take of Southern DPS fish; (4) Alternative B (Proposed Action) where ESA section 9(a)(1) prohibitions are applied to the Southern DPS as in the Full Action Alternative, but with exceptions and exemptions for activities that NMFS has determined to be adequately protective of the Southern DPS; and (5) Alternative C where the ESA section 9(a)(1) prohibitions are applied as described in Alternative A, but with exceptions from the take prohibitions (ESA section 9(a)(1)(B) and 9(a)(1)(C)) for activities that NMFS has determined to be adequately protective of the Southern DPS.

The comparative analysis of the alternatives is described in more detail in the IRFA. In summary, the Full Action Alternative and Alternative B (Proposed Action) are anticipated to affect the largest number of industries, but the impacts Alternative B will have on those industries is expected to be less severe because certain activities may be allowed to continue (e.g., some habitat restoration, emergency rescue, and research/monitoring activities) under this alternative. Alternatives A and C are anticipated to affect a smaller number of industries than the Full Action Alternative and Alternative B. For reasons similar to those explained above, Alternative C is expected to have a less severe impact on the affected industries than Alternative A. The No Action Alternative will have no effect on industries. We invite comments on

the alternative contained in this proposed rule and on whether there is a preferable alternative (including alternatives not described here) that would meet the statutory requirements of ESA section 4(d). We also solicit information regarding the impact that alternative would have on your economic activity and why the alternative is preferable.

*Executive Order (E.O.) 12866 - Regulatory Planning and Review*

The proposed ESA section 4(d) regulations addressed in this rule have been determined to be not significant for the purposes of E.O. 12866. Section 1(b)(12) of E.O. 12866 also requires each agency to write regulations that are easy to understand. We invite your comments (see **ADDRESSES**) on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (5) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the rule? (6) What else could NMFS do to make the rule easier to understand?

*E.O. 12988 - Civil Justice Reform*

We have determined that this proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of E.O. 12988. We are proposing protective regulations pursuant to provisions in the ESA using an existing approach that improves the clarity of the regulations and minimizes the regulatory burden of managing ESA listings while retaining the necessary and advisable protections to provide for the conservation of threatened species.

*E.O. 13175 - Consultation and Coordination With Indian Tribal Governments*

E.O. 13175 requires that if NMFS issues a regulation that significantly or uniquely affects the communities of Indian tribal governments and imposes substantial direct compliance costs on those communities, NMFS must consult with those governments, or the Federal Government must provide the funds necessary to pay the direct compliance costs incurred by the tribal governments. This proposed rule may

impose substantial direct compliance costs on the communities of Indian tribal governments within the range of this DPS. Accordingly, the requirements of section 5(b) and (c) of E.O. 13175 may apply to this proposed rule. Thus, we intend to inform potentially affected tribal governments and to solicit their input on the proposed rule and will continue coordination and discussions with interested tribes as NMFS moves toward a final rule.

*E.O. 13132 - Federalism*

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations where a regulation will preempt state law, or impose substantial direct compliance costs on state and local governments (unless required by statute). Neither of those circumstances is applicable to this proposed rule. In fact, this notice proposes mechanisms by which NMFS, in the form of 4(d) exceptions to take prohibitions, may defer to state and local governments where they provide necessary protections for the Southern DPS.

*Paperwork Reduction Act*

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

This proposed rule contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA) and which have been submitted to OMB for review and approval. Public reporting burden per response for this collection of information is estimated to average: (1) 40 hours for development of a Fisheries Management and Evaluation Plan; (2) 20 hours for development of a Tribal Fishery Management Plan; (3) 40 hours for development of a State-sponsored scientific research program; (4) 5 hours to prepare reports on emergency rescue, salvage or disposal of Southern DPS fish; (5) 40 hours to prepare reports on restoration activities; and (6) 40 hours to prepare reports on federal and private-sponsored research and monitoring. These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. We invite comments regarding these burden estimates, or any other aspect of this data collection, including suggestions for reducing the burden, to

NMFS (see **ADDRESSES**) and to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC. 20503 (Attention: NOAA Desk Officer).

*National Environmental Policy Act (NEPA)*

Whenever a species is listed as threatened, the ESA requires that we shall issue such regulations as we deem necessary and advisable to provide for its conservation. Accordingly, the promulgation of ESA section 4(d) protective regulations is subject to the requirements of NEPA, and we have prepared a draft Environmental Assessment (EA) analyzing the proposed 4(d) regulations and alternatives. We are seeking comment on the draft EA, which is available on the Federal eRulemaking Portal web site (<http://www.regulations.gov>) or upon request (see **DATES** and **ADDRESSES**, above).

*E.O. 13211 - Energy Supply, Distribution, or Use*

E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. According to E.O. 13211, "Asignificant energy action" means any action by an agency that is expected to lead to the promulgation of a final rule or regulation that is a significant regulatory action under E.O. 12866 and is likely to have a significant adverse effect on the supply, distribution, or use of energy. NMFS has determined that the energy effects are unlikely to exceed the energy impact thresholds identified in E.O. 13211 because this proposed rule is not significant under E.O. 12866, and the spatial scope of this proposed rule overlaps with areas where protections for listed salmon are in effect. It is likely that the modifications required for salmon are similar enough to those that would be required for the Southern DPS such that the proposed action is not a significant energy action, and no Statement of Energy Effects is required.

#### List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transportation.

Dated: May 14, 2009.

**James W. Balsiger,**

*Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 223 is proposed to be amended as follows:

#### **PART 223—THREATENED MARINE AND ANADROMOUS SPECIES**

1. The authority citation for part 223 continues to read as follows:

**Authority:** 16 U.S.C. 1531 1543; subpart B, § 223.201 202 also issued under 16 U.S.C. 1361 *et seq.*; 16 U.S.C. 5503(d) for § 223.206(d)(9).

2. In subpart B of part 223, add § 223.210 to read as follows:

##### **§ 223.210 North American green sturgeon.**

(a) *Prohibitions.* The prohibitions of section 9(a)(1)(A) through 9(a)(1)(G) of the ESA (16 U.S.C. 1538) relating to endangered species apply to the threatened Southern Distinct Population Segment (DPS) of North American green sturgeon listed in § 223.102(c)(1).

(b) *Exceptions.* Exceptions to the take prohibitions described in section 9(a)(1)(B) and (C) of the ESA (16 U.S.C. 1538(a)(1)(B) and (C)) applied in paragraph (a) of this section to the threatened Southern DPS listed in § 223.102(c) are described in paragraphs (b)(1) through (b)(3) of this section.

(1) *Scientific research and monitoring exceptions.* The prohibitions of paragraph (a) of this section relating to the threatened Southern DPS listed in § 223.102(c)(1) do not apply to ongoing or future Federal, state, or private-sponsored scientific research or monitoring activities if:

(i) The scientific research or monitoring activity complies with required state reviews or permits.

(ii) The research or monitoring activity is directed at the Southern DPS and is not incidental to research or monitoring of another species.

(iii) Take of live mature adults in the lower Feather River from the confluence with the Sacramento River to the Oroville Dam (rkm 116), the lower Yuba River from the confluence with the Feather River to the Daguerre Dam (rkm 19), or Suisun, San Pablo, and San Francisco Bays or the Sacramento-San Joaquin Delta from the Golden Gate Bridge up into the Sacramento River to Keswick Dam (rkm 483) occurs from July 1 through March 1 so as to substantially increase the likelihood that uninterrupted upstream spawning migrations of adults will occur.

(iv) Take is non-lethal.

(v) Take involving the removal of any life stage of the Southern DPS from the wild does not exceed 60 minutes.

(vi) Take does not involve artificial spawning or enhancement activities.

(vii) A description of the study objectives and justification, a summary of the study design and methodology, estimates of the total non-lethal take of Southern DPS fish anticipated,

estimates of incidental take of other ESA listed species anticipated and proof that those takes have been authorized by NMFS or the USFWS, identification of funding sources, and a point of contact is reported to the NMFS Southwest Regional Office in Long Beach at least 60 days prior to the start of the study, or within 60 days after publication of the final rule for ongoing studies.

(viii) Reports that include the total number of Southern DPS and any other ESA listed species taken, information that supports that take was non-lethal, and a summary of the project results is submitted to the NMFS Southwest Regional Office in Long Beach on a schedule to be determined by NMFS.

(ix) Research or monitoring that involves action, permitting or funding by a Federal agency still complies with the requirements of ESA section 7(a)(2) in order to ensure that the action will not jeopardize the continued existence of the threatened Southern DPS.

(2) *Enforcement exception.* The prohibitions of paragraph (a) of this section relating to the threatened Southern DPS listed in § 223.102(c)(1) do not apply to any employee of NMFS, when the employee, acting in the course of his or her official duties, takes the Southern DPS listed in § 223.102(c)(1) without a permit, if such action is necessary for purposes of enforcing the ESA or its implementing regulations.

(3) *Emergency fish rescue and salvage exceptions.* The prohibitions of paragraph (a) of this section relating to the threatened Southern DPS listed in § 223.102(c)(1) do not apply to emergency fish rescue and salvage activities that include aiding sick, injured, or stranded fish, disposing of dead fish, or salvaging dead fish for use in scientific studies, if:

(i) The activity complies with required state or other Federal reviews or permits.

(ii) The activity is conducted by an employee or designee of NMFS or the U.S. Fish and Wildlife Service (USFWS), any Federal land management agency, or California Department of Fish and Game, Oregon Department of Fish and Wildlife, Washington Department of Fish and Wildlife, or Alaska Department of Fish and Game.

(iii) The activity occurs only because of emergency situations that result from natural disasters, national defense, or security emergencies (see § 402.05 of this title).

(iv) The activity benefits the Southern DPS.

(v) Those carrying out the activity submit a report to the NMFS Southwest Regional Office in Long Beach that includes, at a minimum, the number

and status of fish handled and the location of rescue and/or salvage operations within 30 days after conducting the emergency rescue.

(4) *Habitat restoration exceptions.*

The prohibitions of paragraph (a) of this section relating to the threatened Southern DPS listed in § 223.102(c)(1) do not apply to habitat restoration activities including barrier removal or modification to restore water flows, riverine or estuarine bed restoration, natural bank stabilization, restoration of native vegetation, removal of non-native species, or removal of contaminated sediments, that reestablish self-sustaining habitats for the Southern DPS, if:

(i) The activity complies with required state and Federal reviews and permits.

(ii) Those carrying out the activity submit a detailed description of the restoration activity to the NMFS Southwest Regional Office in Long Beach at least 60 days prior to the start of the restoration project which includes: the geographic area affected; when activities will occur; how they will be conducted; and the severity of direct, indirect, and cumulative impacts of activities on the Southern DPS; identification of funding sources; demonstration that all state and federal regulatory requirements have been met; a description of methods used to ensure that the likelihood of survival or recovery of the listed species is not reduced; a plan for minimizing and mitigating any adverse impacts to Southern DPS spawning or rearing habitat; an estimate of the amount of incidental take of the listed species that may occur and a description of how that estimate was made; a plan for effective monitoring and adaptive management; a pledge to use best available science and technology when conducting restoration activities; and a point of contact.

(iii) Those carrying out the activity submit progress reports that include the total number of Southern DPS taken, information regarding whether the take was lethal or non-lethal, a summary of the status of the project, and any changes in the methods being employed, to the NMFS Southwest Regional Office in Long Beach on a schedule to be determined by NMFS.

(iv) An activity that involves action, permitting or funding by a federal agency complies with the requirements of ESA section 7(a)(2) in order to ensure that the action will not jeopardize the continued existence of the threatened Southern DPS.

(c) *Exemptions via ESA 4(d) program approval.* Exemptions from the take prohibitions described in section

9(a)(1)(B) and (C) of the ESA (16 U.S.C. 1538(a)(1)(B) and (C)) applied in paragraph (a) of this section to the threatened Southern DPS listed in § 223.102(c) are described in paragraphs (c)(1) through (c)(3) of this section.

(1) *Scientific research and monitoring exemptions.* The prohibitions of paragraph (a) of this section relating to the threatened Southern DPS listed in § 223.102(c)(1) do not apply to ongoing or future state-sponsored scientific research or monitoring activities that are part of a NMFS-approved, ESA-compliant state 4(d) research program conducted by, or in coordination with, state fishery management agencies (California Department of Fish and Game, Oregon Department of Fish and Wildlife, Washington Department of Fish and Wildlife, or Alaska Department of Fish and Game), or as part of a monitoring and research program overseen by, or coordinated by, one of these agencies. State 4(d) research programs must meet the following criteria:

(i) Descriptions of the ongoing and future 4(d) research or monitoring activity, as described in paragraph (c)(1)(ii) of this section, must be received by the NMFS Southwest Regional Office in Long Beach within 120 days after publication of the final 4(d) rule. This exception to the section 9 take prohibitions expires if the proposal is rejected as insufficient or is denied.

(ii) Descriptions of ongoing and future state-supported research activities must include the following information and should be submitted to NMFS by the State: an estimate of total direct or incidental take; a description of the study design and methodology; a justification for take and the techniques employed; and a point of contact.

(iii) NMFS will provide written approval of a state 4(d) research program.

(iv) The State agency will provide an annual report to NMFS that, at a minimum, summarizes the number of Southern DPS green sturgeon taken directly or incidentally, and summarizes the results of the project.

(2) *Fisheries exemptions.* The prohibitions of paragraph (a) of this section relating to the threatened Southern DPS listed in § 223.102(c)(1) do not apply to fisheries activities that are conducted in accordance with a NMFS-approved Fishery Management and Evaluation Plan (FMEP). If NMFS finds that an FMEP meets the criteria listed below, a letter of concurrence which sets forth the terms of the FMEP's implementation and the duties of the

parties pursuant to the FMEP, will be issued to the state.

(i) An FMEP must prohibit retention of green sturgeon (i.e. zero bag limit); set maximum incidental take levels, include restrictions to minimize incidental take of the green sturgeon (e.g., temporal/spatial restrictions, size of fish, gear used); provide a biologically based rationale demonstrating that the incidental take management strategy will not significantly reduce the likelihood of survival or recovery; include effective monitoring and evaluation plans; provide for evaluating monitoring data and making revisions to the FMEP; provide for effective enforcement and education; and report the amount of incidental take and summarize the effectiveness of the FMEP to NMFS on a biannual basis.

(ii) The ESA section 9(a)(1)(B) and (a)(1)(C) take prohibitions will not apply to ongoing commercial and recreational fisheries activities after publication of the final rule, for up to 120 days, if a letter of intent to develop an FMEP that is protective of green sturgeon has been received by NMFS within 30 days after the final rule is published in the **Federal Register**. The exemption will expire if the letter of intent is rejected without further review of a FMEP. If the letter of intent is received within 30 days of publication of the final 4(d) rule in the **Federal Register**, a final FMEP must be received by NMFS within 120 days from the date of receipt of the letter of intent. Ongoing commercial and recreational fisheries activities may continue until NMFS issues a letter of concurrence or denial for final FMEPs.

(iii) NMFS' will provide a public comment period ( $\geq$  30 days) before approval of new or amended FMEPs; provide a letter of concurrence for approved FMEPs that specifies the implementation and reporting requirements; evaluate FMEPs on a regular basis and identify changes that would improve their effectiveness; and provide a public comment period ( $\geq$  30 days) before withdrawing approval of an FMEP.

(3) *Tribal exemptions.* The prohibitions of paragraph (a) of this section relating to the threatened Southern DPS listed in § 223.102(c)(1) do not apply to fishery harvest or other activities, undertaken by a tribe, tribal member, tribal permittee, tribal employee, or tribal agent in Willapa Bay, WA, Grays Harbor, WA, Coos Bay, OR, Winchester Bay, OR, Humboldt Bay, CA, and any other area where tribal treaty fishing occurs, if those activities are compliant with a tribal resource management plan (Tribal Plan), provided that the Secretary determines

that implementation of such Tribal Plan will not appreciably reduce the likelihood of survival and recovery of the Southern DPS. In making that determination the Secretary shall use the best available biological data (including any tribal data and analysis) to determine the Tribal Plan's impact on the biological requirements of the species, and will assess the effect of the Tribal Plan on survival and recovery, consistent with legally enforceable tribal rights and with the Secretary's trust responsibilities to tribes.

(i) A Tribal Plan may include, but is not limited to, plans that address fishery harvest, artificial production, research, or water or land management, and may be developed by one tribe or jointly with other tribes. The Secretary will consult on a government-to-government basis with any tribe that so requests and will provide, to the maximum extent practicable, technical assistance in examining impacts on the Southern DPS

as tribes develop Tribal Plans. A Tribal Plan must specify the procedures by which the tribe will enforce its provisions.

(ii) Where there exists a Federal court proceeding with continuing jurisdiction over the subject matter of a Tribal Plan, the plan may be developed and implemented within the ongoing Federal Court proceeding. In such circumstances, compliance with the Tribal Plan's terms shall be determined within that Federal Court proceeding.

(iii) The Secretary shall seek comment from the public on the Secretary's pending determination whether or not implementation of a Tribal Plan will appreciably reduce the likelihood of survival and recovery of the listed Southern DPS.

(iv) The Secretary shall publish notification in the **Federal Register** of any determination regarding a Tribal Plan and the basis for that determination.

(d) *Affirmative defense.* In connection with any action alleging a violation of the prohibitions of paragraph (a) of this section with respect to the threatened Southern DPS of North American green sturgeon listed in § 223.102(c)(1), any person claiming that their take is authorized via methods listed in paragraph (b) of this section shall have a defense where the person can demonstrate that the take authorization is applicable and was in force, and that the person fully complied with the take authorization requirements at the time of the alleged violation. This defense is an affirmative defense that must be raised, pleaded, and proven by the proponent. If proven, this defense will be an absolute defense to liability under section 9(a)(1)(G) of the ESA with respect to the alleged violation.

[FR Doc. E9-11945 Filed 5-20-09; 8:45 am]

**BILLING CODE 3510-22-S**

**TITLE 5--ADMINISTRATIVE PERSONNEL**

**CHAPTER III--OFFICE OF MANAGEMENT AND BUDGET**

**PART 1320\_CONTROLLING PAPERWORK BURDENS ON THE PUBLIC--Table of Contents**

**Sec. 1320.6 Public protection.**

(a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to the requirements of this part if:

(1) The collection of information does not display, in accordance with Sec. 1320.3(f) and Sec. 1320.5(b)(1), a currently valid OMB control number assigned by the Director in accordance with the Act; or

(2) The agency fails to inform the potential person who is to respond to the collection of information, in accordance with Sec. 1320.5(b)(2), that such person is not required to respond to the collection of information unless it displays a currently valid OMB control number.

(b) The protection provided by paragraph (a) of this section may be raised in the form of a complete defense, bar, or otherwise to the imposition of such penalty at any time during the agency administrative process in which such penalty may be imposed or in any judicial action applicable thereto.

(c) Whenever an agency has imposed a collection of information as a means for proving or satisfying a condition for the receipt of a benefit or the avoidance of a penalty, and the collection of information does not display a currently valid OMB control number or inform the potential persons who are to respond to the collection of information, as prescribed in Sec. 1320.5(b), the agency shall not treat a person's failure to comply, in and of itself, as grounds for withholding the benefit or imposing the penalty. The agency shall instead permit respondents to prove or satisfy the legal conditions in any other reasonable manner.

(1) If OMB disapproves the whole of such a collection of information (and the disapproval is not overridden under Sec. 1320.15), the agency shall grant the benefit to (or not impose the penalty on) otherwise qualified persons without requesting further proof concerning the condition.

(2) If OMB instructs an agency to make a substantive or material change to such a collection of information (and the instruction is not overridden under Sec. 1320.15), the agency shall permit respondents to prove or satisfy the condition by complying with the collection of information as so changed.

(d) Whenever a member of the public is protected from imposition of a penalty under this section for failure to comply with a collection of information, such penalty may not be imposed by an agency directly, by an agency through judicial process, or by any other person through administrative or judicial process.

(e) The protection provided by paragraph (a) of this section does not preclude the imposition of a penalty on a person for failing to comply with a collection of information that is imposed on the person by statute--e.g., 26 U.S.C. Sec. 6011(a) (statutory requirement for person to file a tax return), 42 U.S.C. Sec. 6938(c) (statutory requirement for person to provide notification before exporting hazardous waste).

## **e-CFR Data is current as of February 17, 2010**

### **Title 50: Wildlife and Fisheries**

#### **PART 402—INTERAGENCY COOPERATION—ENDANGERED SPECIES ACT OF 1973, AS AMENDED**

##### **Subpart A—General**

#### **§ 402.05 Emergencies.**

(a) Where emergency circumstances mandate the need to consult in an expedited manner, consultation may be conducted informally through alternative procedures that the Director determines to be consistent with the requirements of sections 7(a)–(d) of the Act. This provision applies to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc.

(b) Formal consultation shall be initiated as soon as practicable after the emergency is under control. The Federal agency shall submit information on the nature of the emergency action(s), the justification for the expedited consultation, and the impacts to endangered or threatened species and their habitats. The Service will evaluate such information and issue a biological opinion including the information and recommendations given during the emergency consultation.

## ENDANGERED SPECIES ACT OF 1973

[Public Law 93–205, Approved Dec. 28, 1973, 87 Stat. 884]

[As Amended Through Public Law 107–136, Jan. 24, 2002]

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

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, [16 U.S.C. 1531 note] That this Act may be cited as the “Endangered Species Act of 1973”.*

### TABLE OF CONTENTS

Sec. 2.	Findings, purposes, and policy.
Sec. 3.	Definitions.
Sec. 4.	Determination of endangered species and threatened species.
Sec. 5.	Land acquisition.
Sec. 6.	Cooperation with the States.
Sec. 7.	Interagency cooperation.
Sec. 8.	International cooperation.
Sec. 8A.	Convention implementation.
Sec. 9.	Prohibited acts.
Sec. 10.	Exceptions.
Sec. 11.	Penalties and enforcement.
Sec. 12.	Endangered plants.
Sec. 13.	Conforming amendments.
Sec. 14.	Repealer.
Sec. 15.	Authorization of appropriations.
Sec. 16.	Effective date.
Sec. 17.	Marine Mammal Protection Act of 1972.
[Sec. 18.]	Annual cost analysis by the Fish and Wildlife Service. <sup>1]</sup>

#### FINDINGS, PURPOSES, AND POLICY

SEC. 2. [16 U.S.C. 1531] (a) FINDINGS.—The Congress finds and declares that—

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

<sup>1</sup> Bracketed material does *not* appear in Act. Sec. 1012 of P.L. 100–478, 102 Stat. 2314, October 7, 1988, added sec. 18 of the Act but did not conform the table of contents of the Act.

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to—

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) PURPOSES.—The purposes of this Act are 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, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) POLICY.—(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.

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

#### DEFINITIONS

SEC. 3. [16 U.S.C. 1532] For the purposes of this Act—

(1) The term “alternative courses of action” means all alternatives and thus is not limited to original project objectives and agency jurisdiction.

(2) 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) 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) 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.

(6) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man.

(7) The term "Federal agency" means any department, agency, or instrumentality of the United States.

(8) The term "fish or wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

(9) The term "foreign commerce" includes, among other things, any transaction—

(A) between persons within one foreign country;

(B) between persons in two or more foreign countries;

(C) between a person within the United States and a person in a foreign country; or

(D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.

(10) The term “import” means to land on, bring into, or introduce into or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

[(11) Repealed by section 4(b) of P.L. 97-304, 96 Stat. 1420.]

(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.

(13) The term “person” means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

(14) The term “plant” means any member of the plant kingdom, including seeds, roots and other parts thereof.

(15) The term “Secretary” means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this Act and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

(16) The term “species” includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

(17) The term “State” means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

(18) The term “State agency” means any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

(19) The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(20) The term “threatened species” means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

(21) The term “United States,” when used in a geographical context, includes all States.

#### DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

SEC. 4. [16 U.S.C. 1533] (a) GENERAL.—(1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:

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

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

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) The petitioned action is warranted but that—

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

(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) and to remove from such lists species for which the protections of the Act are no longer necessary, in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

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

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

(iii) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of the authority under paragraph 7<sup>1</sup> to prevent a significant risk to the well being of any such species.

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

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

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

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

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

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

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

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

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

<sup>1</sup> So in original. Probably should be paragraph "(7)".

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

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

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

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

(I) a final regulation to implement such determination,

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

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

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

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

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

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

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

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

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

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination

that such species is endangered or threatened, unless the Secretary deems that—

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

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

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

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

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

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

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

(c) LISTS.—(1) The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to such species over what portion of its range it is endangered or threatened, and specify any 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).

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

(e) SIMILARITY OF APPEARANCE CASES.—The Secretary may, by regulation of commerce or taking, and to the extent he deems advisable, treat any species as an endangered species or threatened species even through it is not listed pursuant to section 4 of this Act if he finds that—

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

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

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

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

(A) give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those spe-

cies that are, or may be, in conflict with construction or other development projects or other forms of economic activity;<sup>1</sup>

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

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

(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<sup>1</sup> of subsection (b) of this section to prevent a significant risk to the well being of any such recovered species.

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

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

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

<sup>1</sup> So in law. Probably should be “; and”.

<sup>1</sup> So in original. Probably should be paragraph “(7)”.

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

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

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

#### LAND ACQUISITION

SEC. 5. (a) **[16 U.S.C. 1534] 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.

(b) **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.

#### COOPERATION WITH THE STATES

SEC. 6. **[16 U.S.C. 1535] (a) GENERAL.**—In carrying out the program authorized by this Act, the Secretary shall cooperate to the maximum extent practicable with the States. Such cooperation shall include consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

(b) **MANAGEMENT AGREEMENTS.**—The Secretary may enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species. Any revenues derived from the administration of such areas under these agreements shall be subject to the

provisions of section 401 of the Act of June 15, 1935 (49 Stat. 383; 16 U.S.C. 715s).

(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 shall make a determination whether such program is in accordance with this Act. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this Act, he 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) authority resides in the State agency of conserve resident species of fish or wildlife determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this Act, for all resident species of fish or wildlife in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife;

(D) the State agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered or threatened species of fish or wildlife; and

(E) provision is made for public participation in designating resident species of fish or wildlife as endangered or threatened; or

that under the State program—

(i) the requirements set forth in subparagraphs (C), (D), and (E) of this paragraph are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of fish and wildlife which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1) with respect to the taking of any resident endangered or threatened species.

(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 shall make a determination whether such program is in accordance with this Act. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this Act, he 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) authority resides in the State agency to conserve resident species of plants determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this Act, for all resident species of plants in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of plants; and

(D) provision is made for public participation in designating resident species of plants as endangered or threatened; or that under the State program—

(i) the requirements set forth in subparagraphs (C) and (D) of this paragraph are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of plants which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1) with respect to the taking of any resident endangered or threatened species.

(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). 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) the international commitments of the United States to protect endangered species or threatened species;

(B) the readiness of a State to proceed with a conservation program consistent with the objectives and purposes of this Act;

(C) the number of endangered species and threatened species within a State;

(D) the potential for restoring endangered species and threatened species within a State;

(E) the relative urgency to initiate a program to restore and protect an endangered species or threatened species in terms of survival of the species;

(F) the importance of monitoring the status of candidate species within a State to prevent a significant risk to the well being of any such species; and

(G) the importance of monitoring the status of recovered species within a State to assure that such species do not return to the point at which the measures provided pursuant to this Act are again necessary.

So much of the annual appropriation made in accordance with provisions of subsection (i) of this section allocated for obligation to any State for any fiscal year as remains unobligated at the close thereof is authorized to be made available to that State until the close of the succeeding fiscal year. Any amount allocated to any State which is unobligated at the end of the period during which it is available for expenditure is authorized to be made available for expenditure by the Secretary in conducting programs under this section.

(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 Federal share of such program costs shall not exceed 75 percent of the estimated program cost stated in the agreement; and

(ii) the Federal share may be increased to 90 percent whenever two or more States having a common interest in one or more endangered or threatened species, the conservation of which may be enhanced by cooperation of such States, enter jointly into agreement with the Secretary.

The Secretary may, in his discretion, and under such rules and regulations as he 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.

(e) REVIEW OF STATE PROGRAMS.—Any action taken by the Secretary under this section shall be subject to his periodic review at no greater than annual intervals.

(f) CONFLICTS BETWEEN FEDERAL AND STATE LAWS.—Any State law or regulation which applies with respect to the importation or

exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this Act or by any regulation which implements this Act, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this Act or in any regulation which implements this Act. This Act shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this Act or in any regulation which implements this Act but not less restrictive than the prohibitions so defined.

(g) TRANSITION.—(1) For purposes of this subsection, the term “establishment period” means, with respect to any State, the period beginning on the date of enactment of this Act and ending on whichever of the following dates first occurs: (A) the date of the close of the 120-day period following the adjournment of the first regular session of the legislative of such State which commences after such date of enactment, or (B) the date of the close of the 15-month period following such date of enactment.

(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) which is then a party to a cooperative agreement with the Secretary pursuant to section 6(c) of this Act (except to the extent that the taking of any such species is contrary to the law of such State); or

(B) except for any time within the establishment period when—

(i) the Secretary applies such prohibition to such species at the request of the State, or

(ii) the Secretary applies such prohibition after he finds, and publishes his finding, that an emergency 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.

(h) REGULATIONS.—The Secretary is authorized to promulgate such regulations as may be appropriate to carry out the provisions of this section relating to financial assistance to States.

(i) APPROPRIATIONS.—(1) To carry out the provisions of this section for fiscal years after September 30, 1988, there shall be deposited into a special fund known as the cooperative endangered species conservation fund, to be administered by the Secretary, an

amount equal to five percent of the combined amounts covered each fiscal year into the Federal aid to wildlife restoration fund under section 3 of the Act of September 2, 1937, and paid, transferred, or otherwise credited each fiscal year to the Sport Fishing Restoration Account established under 1016 of the Act of July 18, 1984.

(2) Amounts deposited into the special fund are authorized to be appropriated annually and allocated in accordance with subsection (d) of this section.

#### INTERAGENCY COOPERATION

SEC. 7. [16 U.S.C. 1536] (a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS.—(1) The Secretary shall review other programs administered by him 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.

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

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

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

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

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

(I) the reasons why a longer period is required;

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

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

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

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

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

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

(B) Consultation under subsection (a)(3), and an opinion based by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2), and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

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

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

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

(C) 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—

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

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

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 with regard to such taking, and

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

(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. If the Secretary advises, based on the best scientific and commercial data available, 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.

(d) **LIMITATION ON COMMITMENT OF RESOURCES.**—After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2).

(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 sub-

section (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.<sup>1</sup>
- (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<sup>1</sup>

(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.

<sup>1</sup>So in law. At the end of section 7(e)(3)(D) of the Endangered Species Act of 1973, the second "Agency." should had been stricken.

<sup>1</sup>So in law. At the end of section 7(e)(4)(B) of the Endangered Species Act of 1973, the period at end of the paragraph was omitted.

(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 in 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 of 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 enhance-

ment 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) 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) 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) 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 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. [16 U.S.C. 1537] (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 country (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 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 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 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 pursuant to section 4 of this Act;

(2) the entering into of bilateral or multilateral agreements with foreign countries to provide for such conservation; and

(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 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 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

(2) conduct or provide financial assistance for the educational training of foreign personnel, in this country or abroad, in fish, wildlife, or plant management, research and law enforcement and to render professional assistance abroad in such matters.

(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 deems necessary to carry out the purposes of this Act.

#### CONVENTION IMPLEMENTATION

SEC. 8A. [16 U.S.C. 1537a] (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.—(1) The Secretary shall do all things necessary and appropriate to carry out the functions of the Scientific Authority under the Convention.

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

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

(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.

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

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

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

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

(3) No later than September 30, 1985, the Secretary and the Secretary of State shall submit a report to Congress describing those steps taken in accordance with the requirements of this subsection and identifying the principal remaining actions yet necessary for comprehensive and effective implementation of the Western Convention.

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

#### PROHIBITED ACTS

SEC. 9. [16 U.S.C. 1538] (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 it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(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 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, it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any state or in the course of any violation of a state criminal trespass law;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(D) sell or offer for sale in interstate or foreign commerce any such species; or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.

(b)(1) SPECIES HELD IN CAPTIVITY OR CONTROLLED ENVIRONMENT.—The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 4 of this Act: *Provided*, That such holding and any subsequent holding or use of the fish or wildlife as 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, 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.

(2)(A) The provisions of subsections (a)(1) shall not apply to—

(i) any raptor legally held in captivity or in a controlled environment on the effective date of the Endangered Species Act Amendments of 1978; or

(ii) any progeny of any raptor described in clause (i); until such time as any such raptor or progeny is intentionally returned to a wild state.

(B) Any person holding any raptor or progeny described in subparagraph (A) must be able to demonstrate that the raptor or progeny does, in fact, qualify under the provisions of this paragraph, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may by

regulation require as being reasonably appropriate to carry out the purposes of this paragraph. Such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary.

(c) VIOLATION OF CONVENTION.—(1) It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in article I thereof.

(2) Any importation into the United States of fish or wildlife shall, if—

(A) such fish or wildlife is not an endangered species listed pursuant to section 4 of this Act but is listed in Appendix II of the Convention;

(B) the taking and exportation of such fish or wildlife is not contrary to the provisions of the Convention and all other applicable requirements of the Convention have been satisfied;

(C) the applicable requirements of subsection (d), (e), and (f) of this section have been satisfied; and

(D) such importation is not made in the course of a commercial activity;

be presumed to be an importation not in violation of any provision of this Act or any regulation issued pursuant to this Act.

(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 (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

(B) as an importer or exporter of any amount of raw or worked African elephant ivory.

(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 and the subsequent disposition, made by him 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 place of business, an opportunity to examine his 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

(C) file such reports as the Secretary may require.

(3) REGULATIONS.—The Secretary shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subsection.

(4) RESTRICTION ON CONSIDERATION OF VALUE OF AMOUNT OF AFRICAN ELEPHANT IVORY IMPORTED OR EXPORTED.—In granting permission under this subsection for importation or exportation of African elephant ivory, the Secretary shall not vary the requirements for obtaining such permission on the basis of the value or amount of ivory imported or exported under such permission.

(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 (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 (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 of 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 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 discretion, he deems it appropriate and consistent with the purpose of this subsection.

(2) Any port designated by the Secretary of the Interior under the authority of section 4(d) of the Act of December 5, 1969 (16 U.S.C. 666cc-4(d)), shall, if such designation is in effect on the day before the date of the enactment of this Act, be deemed to be a port designated by the Secretary under paragraph (1) of this subsection until such time as the Secretary otherwise provides.

(g) VIOLATIONS.—It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section.

#### EXCEPTIONS

SEC. 10. [16 U.S.C. 1539] (a) PERMITS.—(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

(A) any act otherwise prohibited by section 9 for scientific purposes or to enhance the propagation or survival of the af-

fectured species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant subsection (j); or

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

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

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

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

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

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

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

(i) the taking will be incidental;

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

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

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

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

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

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

(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 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 to the extent the Secretary deems appropriate if such person applies to him 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 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;

(B) substantial economic loss to persons who, for the year prior to the notice of consideration of such species as an endangered species, derived a substantial portion of their income from the lawful taking of any listed species, which taking would be made unlawful under this Act; or

(C) curtailment of subsistence taking made unlawful under this Act by persons (i) not reasonably able to secure other sources of subsistence; and (ii) dependent to a substantial extent upon hunting and fishing for subsistence; and (iii) who must engage in such curtailed taking for subsistence purposes.

(3) The Secretary may make further requirements for a showing of undue economic hardship as he deems fit. Exceptions granted under this section may be limited by the Secretary in his 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 days after the date of the notice, of written data, views, or arguments with respect to the application; except that such thirty-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 finds and publishes his 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, and (3) will be consistent with the purposes and policy set forth in section 2 of this Act.

(e) ALASKA NATIVES.—(1) Except as provided in paragraph (4) of this subsection the provisions of this Act shall not apply with respect to the taking of any endangered species or threatened spe-

cies, or the importation of any such species taken pursuant to this section, by—

(A) any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska; or

(B) any non-native permanent resident of an Alaska native village;

if such taking is primarily for subsistence purposes. Non-edible by-products of species taken pursuant to this section may be sold in interstate commerce when made into authentic native articles of handicrafts and clothing; except that the provisions of this subsection shall not apply to any non-native resident of an Alaskan native village found by the Secretary to be not primarily dependent upon the taking of fish and wildlife for consumption or for the creation and sale of authentic native articles of handicrafts and clothing.

(2) Any taking under this subsection may not be accomplished in a wasteful manner.

(3) As used in this subsection—

(i) The term “subsistence” includes selling any edible portion of fish or wildlife in native villages and towns in Alaska for native consumption within native villages or towns; and

<sup>1</sup>(ii) The term “authentic native articles of handicrafts and clothing” means items composed wholly or in some significant respect to natural materials, and which are produced, decorated or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting.

(4) Notwithstanding the provisions of paragraph (1) 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 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)(1) As used in this subsection—

(A) The term “pre-Act endangered species part” means—

(i) any sperm whale oil, including derivatives thereof, which was lawfully held within the United States on December 28, 1973, in the course of a commercial activity; or

<sup>1</sup>So in law. Section 10(e)(3)(ii) of the Endangered Species Act of 1973 paragraph indention is incorrect. Indention should be same as 10(e)(3)(i)

- (ii) any finished scrimshaw product, if such product or the raw material for such product was lawfully held within the United States on December 28, 1973, in the course of a commercial activity.
- (B) The term "scrimshaw product" means any art form which involves the substantial etching or engraving of designs upon, or the substantial carving of figures, patterns, or designs from, any bone or tooth of any marine mammal of the order Cetacea. For purposes of this subsection, polishing or the adding of minor superficial markings does not constitute substantial etching, engraving, or carving.
- (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 shall prescribe, but no such application may be considered by the Secretary unless the application—
- (A) is received by the Secretary before the close of the one-year period beginning on the date on which regulations promulgated by the Secretary to carry out this subsection first take effect;
- (B) contains a complete and detailed inventory of all pre-Act endangered species parts for which the applicant seeks exemption;
- (C) is accompanied by such documentation as the Secretary may require to prove that any endangered species part or product claimed by the applicant to be a pre-Act endangered species part is in fact such a part; and
- (D) contains such other information as the Secretary deems necessary and appropriate to carry out the purposes of this subsection.
- (4) If the Secretary approves any application for exemption made under this subsection, he shall issue to the applicant a certificate of exemption which shall specify—
- (A) any prohibition in section 9(a) of this Act which is exempted;
- (B) the pre-Act endangered species parts to which the exemption applies;
- (C) the period of time during which the exemption is in effect, but no exemption made under this subsection shall have force and effect after the close of the three-year period beginning on the date of issuance of the certificate unless such exemption is renewed under paragraph (8); and
- (D) any term or condition prescribed pursuant to paragraph (5) (A) or (B), or both, which the Secretary deems necessary or appropriate.

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

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

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

(6)(A) Any contract for the sale of pre-Act endangered species parts which is entered into by the Administrator of General Services prior to the effective date of this subsection and pursuant to the notice published in the Federal Register on January 9, 1973, shall not be rendered invalid by virtue of the fact that fulfillment of such contract may be prohibited under section 9(a)(1)(F).

(B) In the event that this paragraph is held invalid, the validity of the remainder of the Act, including the remainder of this subsection, shall not be affected.

(7) Nothing in this subsection shall be construed to—

(A) exonerate any person from any act committed in violation of paragraphs (1)(A), (1)(E), or (1)(F) of section 9(a) prior to the date of enactment of this subsection; or

(B) immunize any person from prosecution for any such act.

(8)(A)(i) Any valid certificate of exemption which was renewed after October 13, 1982, and was in effect on March 31, 1988, shall be deemed to be renewed for a 6-month period beginning on the date of enactment of the Endangered Species Act Amendments of 1988. Any person holding such a certificate may apply to the Secretary for one additional renewal of such certificate for a period not to exceed 5 years beginning on the date of such enactment.

(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 previous 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.

(D) No person may, after January 31, 1984, sell or offer for sale in interstate or foreign commerce, and pre-Act finished scrimshaw product unless such person holds a valid certificate of exemption issued by the Secretary under this subsection, and unless such product or the raw material for such product was held by such person on October 13, 1982.

(g) 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) is not less than 100 years of age;
- (B) is composed in whole or in part of any endangered species or threatened species listed under section 4;
- (C) has not been repaired or modified with any part of any such species on or after the date of the enactment of this Act; and
- (D) is entered at a port designated under paragraph (3).

(2) Any person who wishes to import an article under the exception provided by this subsection shall submit to the customs officer concerned at the time of entry of the article such documentation as the Secretary of the Treasury, after consultation with the Secretary of the Interior, shall by regulation require as being necessary to establish that the article meets the requirements set forth in paragraph (1) (A), (B), and (C).

(3) The Secretary of the Treasury, after consultation with the Secretary of the Interior, shall designate one port within each customs region at which articles described in paragraph (1) (A), (B), and (C) must be entered into the customs territory of the United States.

(4) Any person who imported, after December 27, 1973, and on or before the date of the enactment of the Endangered Species Act Amendments of 1978, any article described in paragraph (1) which—

- (A) was not repaired or modified after the date of importation with any part of any endangered species or threatened species listed under section 4;
- (B) was forfeited to the United States before such date of the enactment, or is subject to forfeiture to the United States on such date of enactment, pursuant to the assessment of a civil penalty under section 11; and
- (C) is in the custody of the United States on such date of enactment;

may, before the close of the one-year period beginning on such date of enactment make application to the Secretary for return of the article. Application shall be made in such form and manner, and contain such documentation, as the Secretary prescribes. If on the basis of any such application which is timely filed, the Secretary is satisfied that the requirements of this paragraph are met with respect to the article concerned, the Secretary shall return the article to the applicant and the importation of such article shall, on and after the date of return, be deemed to be a lawful importation under this Act.

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

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

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

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

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

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

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

(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.

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

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

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

(i) solely for purposes of section 7 (other than subsection (a)(1) thereof), an experimental population determined under subparagraph (B) to be not essential to the continued existence of a species shall be treated, except when it occurs in an area within the National Wildlife Refuge System or the National Park System, as a species proposed to be listed under section 4; and

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

(3) The Secretary, with respect to population of endangered species or threatened species that the Secretary authorized, before the date of the enactment of this subsection, for release in geographical areas separate from the other populations of such species, shall determine by regulation which of such populations are an experimental population for the purposes of this subsection and

whether or not each is essential to the continued existence of an endangered species or a threatened species.

PENALTIES AND ENFORCEMENT

SEC. 11. [16 U.S.C. 1540] (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 or 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 action if it is supported by substantial evidence on the record considered as a whole.

(2) Hearings held during proceedings for the assessment of civil penalties by paragraph (1) of this subsection shall be conducted in accordance with section 554 of title 5, United States Code. The Secretary may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person pursuant to this paragraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(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 was acting to protect himself or herself, a mem-

ber of his or her family, or any other individual from bodily harm, from any endangered or threatened species.

(b) CRIMINAL VIOLATIONS.—(1) Any person who knowingly violates any provision of this Act, 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 a regulation relating to recordkeeping, or filing of reports), (f), or (g) of section 9 of this Act shall, upon conviction, be fined not more than \$50,000 or imprisoned for not more than one year, or both. Any person who knowingly violates any provision of any other regulation issued under this Act shall, upon conviction, be fined not more than \$25,000 or imprisoned for not more than six months, or both.

(2) The head of any Federal agency which has issued a lease, license, permit, or other agreement authorizing a person to import or export fish, wildlife, or plants, or to operate a quarantine station for imported wildlife, or authorizing the use of Federal lands, including grazing of domestic livestock, to any person who is convicted of a criminal violation of this Act or any regulation, permit, or certificate issued hereunder may immediately modify, suspend, or revoke each lease, license, permit, or other agreement. The Secretary shall also suspend for a period of up to one year, or cancel, any Federal hunting or fishing permits or stamps issued to any person who is convicted of a criminal violation of any provision of this Act or any regulation, permit, or certificate issued hereunder. The United States shall not be liable for the payments of any compensation, reimbursement, or damages in connection with the modification, suspension, or revocation of any leases, licenses permits stamps, or other agreements pursuant to this section.

(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 was acting to protect himself or herself, a member of his or her family, or any other individual, from bodily harm from any endangered or threatened species.

(c) DISTRICT COURT JURISDICTION.—The several district courts of the United States; including the courts enumerated in section 460 of title 28, United States Code, shall have jurisdiction over any actions arising under this Act. For the purpose of this Act, American Samoa shall be included within the judicial district of the District Court of the United States for the District of Hawaii.

(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 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) The provisions of this Act and any regulations or permits issued pursuant thereto shall be enforced by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, or all such Secretaries. Each such Secretary may utilize by agreement, with or without reimbursement, the personnel, services, and facilities of any other Federal agency or any State agency for purposes of enforcing this Act.

(2) The judges of the district courts of the United States and the United States magistrates may within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process as may be required for enforcement of this Act and any regulation issued thereunder.

(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 exportation. Such persons may make arrests without a warrant for any violation of this Act if he has reasonable grounds to believe that the person to be arrested is committing the violation in his 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.

(4)(A) All fish or wildlife or plants taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported contrary to the provisions of this Act, any regulation made pursuant thereto, or any

permit or certificate issued hereunder shall be subject to forfeiture to the United States.

(B) All guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation used to aid the taking, possessing, selling, purchasing, offering for sale or purchase, transporting, delivering, receiving, carrying, shipping, exporting, or importing of any fish or wildlife or plants in violation of this Act, any regulation made pursuant thereto, or any permit or certificate issued thereunder shall be subject to forfeiture to the United States upon conviction of a criminal violation pursuant to section 11(b)(1) of this Act.

(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 may designate.

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

(f) REGULATIONS.—The Secretary, the Secretary of the Treasury, and the Secretary of the Department in which the Coast Guard is operating, are authorized to promulgate such regulations as may be appropriate to enforce this Act, and charge reasonable fees for expenses to the Government connected with permits or certificates authorized by this Act including processing applications and reasonable inspections, and with the transfer, board, handling, or storage of fish or wildlife or plants and evidentiary items seized and forfeited under this Act. All such fees collected pursuant to this subsection shall be deposited in the Treasury to the credit of the appropriation which is current and chargeable for the cost of furnishing the services. Appropriated funds may be expended pending reimbursement from parties in interest.

(g) CITIZEN SUITS.—(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this Act or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 6(g)(2)(B)(ii) of this Act, the prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1)(B) of this Act with respect to the taking of any resident endangered species or threatened species within any State; or

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

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section—

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 6(g)(2)(B)(ii) of this Act to determine whether any such emergency exists.

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

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).

(h) COORDINATION WITH OTHER LAWS.—The Secretary of Agriculture and the Secretary shall provide for appropriate coordination of the administration of this Act with the administration of the animal quarantine laws (21 U.S.C. 101–105, 111–135b, and 612–

614) and section 306 of the Tariff Act of 1930 (19 U.S.C. 1306). Nothing in this Act or any amendment made by this Act shall be construed as superseding or limiting in any manner the functions of the Secretary of Agriculture under any other law relating to prohibited or restricted importations or possession of animals and other articles and no proceeding or determination under this Act shall preclude any proceeding or be considered determinative of any issue of fact or law in any proceeding under any Act administered by the Secretary of Agriculture. Nothing in this Act shall be construed as superseding or limiting in any manner the functions and responsibilities of the Secretary of the Treasury under the Tariff Act of 1930, including, without limitation, section 527 of that Act (19 U.S.C. 1527), relating to the importation of wildlife taken, killed, possessed, or exported to the United States in violation of the laws or regulations of a foreign country.

## ENDANGERED PLANTS

SEC. 12. [16 U.S.C. 1541] The Secretary of the Smithsonian Institution, in conjunction with other affected agencies, is authorized and directed to review (1) species of plants which are now or may become endangered, or threatened and (2) methods of adequately conserving such species, and to report to Congress, within one year after the date of the enactment of this Act, the results of such review including recommendations for new legislation or the amendment of existing legislation.

## CONFORMING AMENDMENTS

SEC. 13. [Section 13 consists of amendments to other Acts.]

## REPEALER

SEC. 14. [Section 14 consists of repeals of provisions of law.]

## AUTHORIZATION OF APPROPRIATIONS

SEC. 15. [16 U.S.C. 1542] (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 year 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<sup>1</sup> 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. [16 U.S.C. 1531 note] This Act shall take effect on the date of its enactment.

#### MARINE MAMMAL PROTECTION ACT OF 1972

SEC. 17. [16 U.S.C. 1543] 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. [16 U.S.C. 1544] 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.

<sup>1</sup> So in original. Probably should be “section”.