

Quick-Reference Legal Summary

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Federal Wildlife and Related Laws Handbook; Chapter 4. Statute Summaries

ENDANGERED SPECIES ACT OF 1973

16 U.S.C. §§ 1531-1544, December 28, 1973, as amended 1976-1982, 1984 and 1988.

Overview. The Endangered Species Act provides broad protection for species of fish, wildlife and plants that are listed as threatened or endangered in the U.S. or elsewhere. Provisions are made for listing species, as well as for recovery plans and the designation of critical habitat for listed species. The Act outlines procedures for federal agencies to follow when taking actions that may jeopardize listed species, and contains exceptions and exemptions. The Endangered Species Act also is the enabling legislation for the Convention on International Trade in Endangered Species of Wild Fauna and Flora, commonly known as CITES. Criminal and civil penalties are provided for violations of the Act and the Convention.

Findings/Policy (ESA § 2). Congress found that various species of fish, wildlife and plants in the U.S. have been rendered extinct and others depleted to the point of being in danger of or threatened with extinction. Congress declared that: depleted species are of aesthetic, ecological, educational, historical, recreational and scientific value; the U.S. has pledged to conserve various species facing extinction pursuant to several international treaties and agreements; encouraging states and other interested parties, through federal financial assistance and a system of incentives, to develop conservation programs meeting national and international standards is a key to meeting international commitments and to safeguarding the nation's heritage in fish, wildlife and plants.

The purposes of the Act are to: provide a means of conserving the ecosystems upon which endangered and threatened species depend; provide a program for conserving those species; take steps necessary to achieve the purposes of the international treaties and conventions. The policy of Congress is that federal agencies must seek to conserve endangered and threatened species and use their authorities in furtherance of the Act's purposes. § 1531.

Selected Definitions (ESA § 3). Conserve: the use of all necessary methods and procedures to bring any endangered or threatened species to the point at which the measures under the Act are no longer necessary. This includes, but is not limited to, all activities associated with scientific resources management, such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping or transplantation, and, in the extraordinary case where population pressures within an ecosystem cannot be otherwise relieved, may include regulated taking. Convention (or CITES): Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and its appendices. Critical habitat for a threatened or endangered species: (i) the specific areas within the geographical area occupied by the species, at the time it is listed as threatened or endangered, on which are found physical or biological features essential to the conservation of the species, and which may require special management considerations or protection; and (ii) specific areas outside the geographical areas occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Critical habitat may be established for species now listed as threatened or endangered for which no critical habitat has been established. Except in circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species. Endangered species: 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 Act would present an overwhelming and overriding risk to man. Fish or wildlife: 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. Plant: any member of the plant kingdom, including seeds, roots and other parts thereof. Secretary: except as otherwise provided, the Secretary of the Interior or the Secretary of Commerce, who is responsible for fish and other marine species under Reorganization Plan No. 4 of 1970 and under this Act. With respect to enforcement of the provision of the Act and the Convention regarding importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture. 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. Take: harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any



such conduct. Threatened species: any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. § 1532.

Determination of Endangered and Threatened Species (ESA § 4). The Act requires the Secretary of the Interior to list species as endangered or threatened because of any of a number of factors, including habitat destruction, overutilization, disease or predation, inadequacy of regulatory mechanisms, or other natural or man-made factors. In the case of marine plants, fish or wildlife, the Secretary of Commerce determines whether the Secretary of the Interior will list a species or change the status of a species from threatened to endangered.

Listing determinations must be made solely on the basis of the best scientific and commercial data available, after a review of the status of the species and taking into account any efforts being made to protect such species by a state, foreign nation or political subdivision of a state or foreign nation. The Secretary must give consideration to species designated as requiring protection by a foreign nation or pursuant to an international agreement, or identified as in danger of extinction by a state or foreign agency.

A regulation designating critical habitat for the species being listed must be published at the same time as the listing. The Act requires the Secretary to designate critical habitat on the basis of the best scientific data available and after taking into consideration the economic impact and any other relevant impact of specifying a particular area. An area may be excluded if it is determined that the benefits of exclusion outweigh the benefits of designation, unless the Secretary determines that exclusion will result in extinction of the species. A final regulation designating critical habitat does not have to be published simultaneously with the listing if the Secretary finds that it is essential to the species' conservation to publish the listing promptly. If critical habitat is not then determinable, the Secretary may have up to an additional year to publish the final regulation.

To the maximum extent practicable, within 90 days of receiving a petition of an interested person to add or delete a species from the listings, the Secretary must make a finding as to whether the petition presents substantial scientific or commercial information indicating that action may be warranted. If so, the Secretary must commence a review of the status of the species promptly, and publish findings in the *Federal Register* within 12 months of receiving the petition. The Secretary must find either that the petitioned action is not warranted, that it is warranted, or that it is warranted but that other action is being pursued. Similar procedures apply for petitions to revise a designation of critical habitat.

Provisions are made for the publication of proposed regulations to implement a listing or critical habitat determination, designation or revision; a public hearing must be held upon request of any person within 45 days of publication. Final regulations and withdrawals are to be published in the *Federal Register* within a year of publication of proposed regulations. The one-year period may be extended if the Secretary finds substantial disagreement regarding the sufficiency or accuracy of available data.

Emergency listing is allowed if an emergency exists posing a significant risk to the well-being of any species, if the regulation gives detailed reasons why it is necessary and actual notice is given to the state agency in each state where the species occurs. Emergency regulations take effect immediately upon publication and are effective for 240 days. When any proposed or final regulation is published in the *Federal Register*, the publication must include a summary of the data upon which the Secretary relied. In the case of critical habitat designation, the summary must include a description and evaluation of activities which may adversely modify the habitat or be affected by the designation. The Act requires the Secretary to publish lists of all species determined to be endangered or threatened, the range over which they are endangered or threatened, and their critical habitats. The Secretary must revise lists periodically to reflect recent actions and is required to review the list at least every five years to determine the need for removal or change in status. The Secretary may treat an unlisted species as listed if: it so closely resembles a listed species that enforcement personnel would have substantial difficulty in attempting to differentiate between the species; the effect of this difficulty is an additional threat to the listed species; this treatment will substantially facilitate enforcement and further the Act's policy. Regulations must be issued to provide for the conservation of threatened species. The Secretary must develop and implement recovery plans for the conservation and survival of listed species, unless such plans will not promote species conservation. To the maximum extent practicable, the Secretary must give priority to endangered or threatened species most likely to benefit from recovery plans, especially those species in conflict with development projects or other economic activity. Plans are to include site-specific management actions, measurable criteria which, when met, would result in delisting, and estimates of time and cost for intermediate and final goals of recovery plans. Public and private agencies and institutions may be enlisted for a recovery team, which is not subject to the Federal Advisory Committee Act. Notice and opportunity for public review and comment must be provided for recovery plans, and all information presented during the comment period must be considered prior to plan approval.

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The Secretary must report to Congress on efforts to develop and implement recovery plans and on the status of all listed species. Species which have recovered and are delisted must be monitored in cooperation with the states for at least five years. Emergency listing procedures are available to prevent a significant risk to the well-being of a recovered species.

The Secretary must establish and publish agency guidelines to insure that the purposes of this section are achieved efficiently and effectively, including procedures for dealing with petitions, criteria for making findings regarding petitions, a ranking system for priority review of species, and a system for developing and implementing recovery plans. If a state agency files comments disagreeing with all or part of a regulation proposed under the authority of this section and a regulation is adopted anyway, or a state agency petition does not result in a regulation, the Secretary must submit a written justification to the state agency. § 1533.

Land Acquisition (ESA § 5). The Secretary, and the Secretary of Agriculture with respect to the National Forest System, must establish and implement a program to conserve fish, wildlife and plants, including those listed. To carry out the program, the appropriate Secretary is to use land acquisition and other authority under the Fish and Wildlife Act of 1956, the Fish and Wildlife Coordination Act and the Migratory Bird Conservation Act. The Secretary is also authorized to acquire, by purchase, donation or otherwise, lands, waters or interests therein. Funds from the Land and Water Conservation Fund Act of 1965 may be used for acquisitions. § 1534.

Cooperation with the States (ESA § 6). The Secretary is to cooperate to the maximum extent practicable with the states, including consulting with a state before acquiring land, water or interests for conservation of listed species. The Secretary may enter into agreements with states for administration and management of areas established for conservation of listed species. Cooperative agreements may also be entered into with states which establish and maintain adequate and active programs for conservation of listed species. For a program to be considered adequate and active, the Secretary annually must find that: the state agency has authority to conserve resident listed species; acceptable conservation programs have been established and provided to the Secretary for all resident listed species; the agency is authorized to determine the status and requirements for survival of resident species of fish and wildlife, and to establish programs, including land or other acquisitions, for conservation of resident listed species; provision is made for public participation in the listing process. Alternatively, the Secretary must find that certain of these requirements are met and that plans are included for immediate attention to listed species most urgently in need of conservation programs. Cooperative agreements also may be entered into for conservation of listed resident plant species. Provisions are identical to those for fish and wildlife species.

Financial assistance may be provided to any state with a cooperative agreement to assist in development of conservation programs or to assist in monitoring candidate species and recovered species. Annual appropriations must be based on consideration of: international commitments of the U.S. to protect endangered or threatened species; readiness of a state to proceed with a conservation program; numbers of listed species within a state; potential for restoration of listed species in a state; relative urgency to initiate a program to save a listed species; importance of monitoring the status of candidate and recovered species within a state.

Cooperative agreements must provide for actions to be taken by the Secretary and the state, benefits expected to be derived for listed species, estimated costs of actions, and the share of costs to be borne by each party. The federal share may not exceed 75 percent of estimated costs, although it may be increased to 90 percent when two or more states have a common interest in a listed species and its conservation may be enhanced by the cooperation of the states. The federal share may be advanced to states by the Secretary, either in money or in property whose value will be determined by the Secretary. The Secretary may review the actions taken under this section no more often than annually.

State laws as to importation or exportation of listed species are void to the extent that they permit anything prohibited by the Act or its regulations, or prohibit actions authorized under exemption or permit under the Act. A state law or regulation may be more but not less restrictive than the Act or its regulations. The prohibitions of § 1533 (ESA § 4) do not apply to the taking of listed species within any state that is a party to a cooperative agreement, except upon request of the state or when the Secretary finds an emergency situation exists posing a significant risk to the well-being of the species.

The Secretary may make regulations as appropriate regarding financial assistance to the states. Beginning in fiscal year 1989, 5 percent of the monies credited to the federal aid in wildlife and sportfish restoration funds are to be deposited to a cooperative endangered species conservation fund to carry out the provisions of this section. § 1535.

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Interagency Cooperation (ESA § 7). The Secretary must review other programs within the department and utilize these programs in furtherance of the purposes of the Act. All other federal agencies, in consultation with and with the assistance of the Secretary, also must use their authorities in furtherance of the purposes of the Act by carrying out programs for the conservation of listed species.

All federal agencies, in consultation with and with the assistance of the Secretary, must insure that any action authorized, funded or carried out by the agency (agency action) is not likely to jeopardize the continued existence of an endangered or threatened species, or result in destruction or adverse modification of a critical habitat of a species. Agencies are required to use the best scientific and commercial data available to fulfill this charge. Consultation with the Secretary shall be concluded within 90 days or any other period of time mutually agreeable to the Secretary and the agency. If the agency action involves a permit or license, the period may be extended up to 150 days if the Secretary submits to the applicant a statement of reasons, the information needed and the estimated date of completion of consultation. It may be further extended with the consent of the applicant. Once a consultation is initiated, the agency and the applicant may not make an irreversible or irretrievable commitment of resources which has the effect of foreclosing reasonable and prudent alternative measures.

Agencies must consult with the Secretary on a prospective agency action if requested by a permit or license applicant, if the applicant has reason to believe that a listed species may be present in the project area and is likely to be affected. Consultations are to be concluded within a period agreeable to the Secretary, agency and applicant. Agencies also must confer with the Secretary on any agency action likely to jeopardize the continued existence of any species proposed to be listed, or result in destruction or adverse modification of proposed critical habitat. There is no limitation on the commitment of resources to the project in this case.

Promptly after consultation, the Secretary must provide to the agency and any applicant a written statement of the Secretary's opinion and a summary of the information on which the opinion is based, detailing how the action affects the species or critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest reasonable and prudent alternatives to the agency and the applicant. If, after consultation, the Secretary concludes either that the agency action will not violate the Act or that taking of a listed species will not violate the Act or is otherwise authorized, a written statement will be provided the federal agency and the applicant. The statement will specify the impact of the incidental taking on the species, reasonable and prudent measures necessary or appropriate to minimize the impact and the measures necessary to comply with the law.

For all agency actions for which no construction has begun or contracts for construction entered into, the agency must inquire as to whether any listed or proposed to be listed species is in the area of the proposed action. If, based on the best scientific and commercial data available, the Secretary determines that such species are present, the agency must conduct a biological assessment to identify the species likely to be affected. Assessments must be completed within 180 days unless other provisions are met, and before actual construction or construction contracts are entered into. Assessments may be part of the National Environmental Policy Act (NEPA) compliance by the agency.

The Act establishes an Endangered Species Committee to review applications for exemptions from agency obligations, described in the next paragraph. The seven-member Committee includes: the Secretaries of Agriculture, Army, and the Interior; the Chairman of the Council of Economic Advisors; the Administrators of the EPA and the National Oceanic and Atmospheric Administration; and a Presidential appointment to represent each of the states affected by a particular application. The Secretary of the Interior chairs the Committee. Meetings are held at the call of the Chair or five members, and are open to the public. Any federal agency may assist the Committee or provide information when requested. The Committee may hold hearings, issue subpoenas, take testimony and evidence as it deems advisable, and take any action authorized. The Committee may promulgate rules, regulations and procedures, and may issue orders it deems necessary.

A federal agency, state governor, or permit or license applicant may apply for an exemption from the Act if, after consultation, the Secretary's opinion indicates that an agency action would violate the Act. The Secretary must promulgate regulations for the form and manner of applications for exemption. Applications must include descriptions of the consultation process between the agency and Secretary and why the agency action cannot be modified or altered. They must be submitted no more than 90 days after completion of consultation, or no more than 90 days after the agency takes final action on the permit or license application. The governor of the affected state is to be notified, and notice of the exemption application will be published in the *Federal Register*.

To grant the application, the Secretary must determine within 20 days of receipt of the application or within a time mutually acceptable to the applicant and the Secretary, that the federal agency involved and the applicant have consulted in good faith and made a reasonable and responsible effort to consider modifications or reasonable and



prudent alternatives to the proposed agency action; conducted any required biological assessment; refrained from making any irreversible or irretrievable commitment of resources. The Secretary must deny the application for exemption if these requirements are not met. This denial is considered a final agency action. If the agency and the exemption applicant have met the requirements, the Secretary, in consultation with the Committee, will hold a hearing on the application.

Within 140 days of the determination, or other mutually agreeable time, the Secretary must report to the Committee on: the availability of reasonable and prudent alternatives; the nature and extent of the benefits of the agency action consistent with conserving the species or critical habitat; evidence of whether the agency action is in the public interest and of regional or national significance; reasonable mitigation measures that should be considered by the Committee; whether the agency and exemption applicant refrained from making an irreversible or irretrievable commitment of resources. All meetings and records resulting from an application for exemption are open to the public.

The Act requires the Committee to determine whether to grant an exemption within 30 days after receiving the Secretary's report. The exemption must be granted if, by a vote of at least five of its members, the Committee determines that: there are no reasonable and prudent alternatives; the benefits of the action outweigh the benefits of alternative courses and are consistent with conserving the species or its critical habitat; the action is in the public interest and of regional or national significance; there was no irreversible or irretrievable commitment of resources. For approved exemptions the Committee must establish mitigation and enhancement measures, including live propagation, transplantation, and habitat acquisition and improvement, to minimize the adverse effects of the action. The Committee's determination is considered a final agency action.

An exemption for an agency action is permanent with respect to all endangered and threatened species if a biological assessment was conducted, regardless of whether the species was identified in the assessment, unless the Secretary finds the exemption would result in the extinction of a species that was not the subject of the consultation or identified in the biological assessment. The Committee must decide that the exemption should not be permanent within 60 days of the Secretary's finding. The granting of an exemption is not a major federal action for purposes of NEPA, provided that an environmental impact statement which discusses the impact upon endangered or threatened species or their critical habitat was previously prepared for the agency action.

An exemption cannot be granted if the Secretary of State determines that the exemption will violate an international treaty or other international obligation of the U.S. An exemption must be granted if the Secretary of Defense finds that the exemption is necessary for national security. If an area is declared a major disaster area under the Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121 *et seq.*, the President may grant an exemption for the repair or replacement of a public facility substantially as it existed prior to the disaster.

If an exemption is granted, the Committee must specify the mitigation and enhancement measures to be paid for by the applicant. These measures must be authorized prior to implementation of the agency action and funded concurrently with other project features. The costs of the measures must not be treated as project costs in any cost/benefit analysis for the action. Within one year of being granted an exemption, and annually until all the measures have been completed, the applicant must submit a report to the Council on Environmental Quality describing compliance with the mitigation and enhancement measures. Notice of the public availability of the reports is to be published in the *Federal Register*.

Any person may obtain judicial review of a decision of the Committee granting or not granting an exemption. The 60-day notice requirement for citizen suits does not apply to a determination of the Committee granting an exemption. § 1536.

International Cooperation (ESA § 8). The President, with the foreign country's consent, may use foreign currencies to provide assistance for any listed endangered or threatened species, which may include acquisition of lands, waters or interests therein. These currencies must be used in preference to funds appropriated under § 1542 of the Act (ESA § 13).

The Secretary, through the Secretary of State, must: encourage foreign countries to provide for the conservation of fish, wildlife and plants, including listed species; enter into bilateral or multilateral agreements for this purpose; encourage and assist foreign persons who take fish, wildlife and plants for import to the U.S. for commercial or other purposes to develop and carry out conservation procedures. Further, the Secretary may provide personnel and financial assistance for the training of foreign personnel and for research and law enforcement, and may conduct law enforcement investigations and research abroad as necessary to carry out the Act. § 1537.

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Convention Implementation (ESA § 8a). For purposes of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Secretary of the Interior is designated as the Management Authority and the Scientific Authority, with the functions of the Authorities to be carried out by the Fish and Wildlife Service. The Secretary must give advice and make determinations under Article IV of CITES based on the best available biological information derived from professionally accepted wildlife management practices, but is not required to make population estimates. If the U.S. votes against including a species under CITES and does not enter a reservation pursuant to CITES, the Secretary of State must submit a report to the appropriate Senate and House committees.

The Secretary, in cooperation with the Secretary of State and other Secretaries, represents the U.S. regarding the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (the Western Convention). The Secretary must take steps to implement the Western Convention, including developing personnel resources and programs, identifying species, habitats and cooperative measures to ensure that species of migrating birds will not become threatened or endangered, and identifying measures for the protection of wild plants. The Secretaries were directed to submit a progress report to Congress by September 30, 1985. These provisions do not affect the authority, jurisdiction or responsibility of the states to manage or regulate resident fish or wildlife. § 1537a.

Prohibited Acts (ESA § 9). Except as otherwise provided in the Act, with respect to endangered species of fish or wildlife, it is unlawful to: import or export; take within the U.S. or on the seas; possess, sell, deliver, carry, transport or ship any taken species; deliver, receive, carry, transport, shop, sell or offer to sell these species in interstate or foreign commerce; violate any regulation pertaining to a threatened or endangered fish or wildlife species. Except as provided, with respect to endangered species of plants, it is unlawful to: import or export; remove the species from areas under federal jurisdiction or maliciously damage or destroy it in those areas; remove, cut, dig up, damage or destroy the species in any other area in violation of state law or in the course of criminal trespass; deliver, receive, carry, transport, ship, sell or offer for sale in interstate or foreign commerce; violate any regulation pertaining to a threatened or endangered plant species.

These prohibitions do not apply to species held in captivity or a controlled environment as of December 28, 1973, or as of the date of publication of the final regulation listing the species, provided that the holding is not in the course of commercial activity. If the violation occurs after a period of 180 days from the publication of the regulation, there is a rebuttable presumption that the fish or wildlife involved is not entitled to an exemption under the Act. The prohibitions also do not apply to any raptor legally held in captivity or a controlled environment on November 10, 1978, or the progeny of those raptors, until the time they are returned to the wild. Proof of these conditions must be submitted to the Secretary upon request.

It is unlawful for a person to trade or possess any specimens traded in violation of CITES. It is not a violation of this Act to import species into the U.S. if: the species is not endangered, but is listed in Appendix II of CITES; taking and exportation are not contrary to CITES and all other Convention requirements are met; the provisions of this section of the Act are met; the importation is not made in the course of a commercial activity.

Without previous permission of the Secretary, it is unlawful to conduct business as an importer or exporter of fish (except shellfish and fishery products not listed as threatened or endangered and used for human or animal consumption), wildlife, plants, or any amount of raw or worked African elephant ivory. Authorized importers and exporters must maintain records of each import and export, allow access to records and place of business, and file reports at the request of the Secretary. Failure to file the requested reports is a violation of the Act. The requirements for obtaining permission to import or export African elephant ivory must be the same regardless of value or amount. The Secretary, by regulation, must designate ports to be used for importation and exportation of fish, wildlife and plants. Use of non-designated ports without permission of the Secretary is prohibited. It is unlawful for a person to attempt to commit, solicit another to commit or cause to be committed any of the offenses in this section. § 1538.

Exceptions (ESA § 10). The Secretary may permit a prohibited act for scientific purposes, for the establishment and maintenance of experimental populations, or otherwise to enhance the propagation and survival of an affected species. The Secretary, by permit, may allow a taking incidental to an otherwise lawful activity if the applicant submits a conservation plan that addresses the impact of the taking, mitigation measures, funding, alternative actions considered and other measures required by the Secretary as necessary or appropriate. A permit may be issued if the Secretary approves the conservation plan and finds that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. The permit must be revoked if the permittee does not comply with the terms and conditions of the permit.



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If a person enters into a contract with respect to a species before notice of consideration of that species as endangered is published in the *Federal Register*, and the subsequent listing will cause undue economic hardship, the Secretary may exempt the person from the Act's prohibitions for up to one year from the date of publication. Undue economic hardship is defined as: substantial economic loss due to an inability to perform the contract, or due to a loss of income if, in the year prior to the publication, the person derived a substantial portion of their income from the lawful taking of that species; curtailment of subsistence taking for a person who is dependent to a substantial extent on hunting and fishing for subsistence and is not able to secure other sources of subsistence. The Secretary may further define undue economic hardship as the Secretary deems fit.

The Secretary must publish notice in the *Federal Register* of each application for exemption or permit and invite the submission within 30 days of written data, views or arguments on the application. These submissions are part of the public record. The Secretary may grant the exceptions only if the Secretary finds that they were applied for in good faith, will not operate to the disadvantage of the endangered species, and are consistent with the purposes and policies of the Act. These findings must be published in the *Federal Register*. In actions alleging a violation of this section, the holder of the exemption or permit must prove that the exemption or permit is applicable, has been granted, and was in full force and effect at the time of the alleged violation.

An Indian, Aleut, or Eskimo who is a native and resident of Alaska, or a non-native resident of an Alaskan native village, may take or import a threatened or endangered species if the taking is primarily for subsistence and is accomplished in a nonwasteful manner. Non-edible species byproducts made into authentic native clothing or handicrafts may be sold in interstate commerce. If the Secretary determines that such taking materially and negatively affects the species, the Secretary may prescribe, after notice and hearings in the affected judicial district in Alaska, regulations on takings with reference to species, geographical area, seasons and other factors consistent with this Act. Upon application, the Secretary may exempt a pre-Act endangered species part from the prohibitions on exportation from the U.S. and the use of interstate or foreign commerce, if not in violation of CITES. A pre-Act endangered species part is defined as sperm whale oil or any raw material or finished scrimshaw product lawfully held within the U.S. on December 28, 1973, in the course of commercial activity. Scrimshaw product is an art form with substantial etching or engraving on, or substantial carving from, any bone or tooth of a marine mammal of the order *Cetacea*. The application for exemption must contain an inventory, documentation and other required information, and must be received within one year after the Secretary's regulations take effect. These regulations may require applicants to register inventories, keep sales records, permit inspections and file reports, and may impose terms and conditions on subsequent purchasers. When issuing an exemption, the Secretary must specify the prohibition that is exempted, the parts to which the exemption applies, the time period the exemption is in effect and other terms and conditions. The prohibitions regarding commerce do not apply to an Article which: is at least 100 years old; is composed in whole or in part of a listed threatened or endangered species; has not been repaired or modified with any part of such species; and is entered in a designated port. The Secretary of the Treasury, by regulation, must require documentation of these conditions and designate one port within each customs region for entry of such Articles.

An importation of fish or wildlife into the U.S. is not in violation of the Act if: the species was lawfully taken and exported from its country of origin; the species is in transit to a country where it may be lawfully imported and received; the owner or exporter gave instructions not to ship the species through the jurisdiction of the U.S., and the circumstances of shipment were beyond the exporter's control; the requirements of CITES have been satisfied; and the importation was not made in the course of commercial activity.

The Secretary may authorize the release of an experimental population outside the existing range of the species if this will further the conservation of the species and the population is essential to the continued existence of the species. An experimental population is defined as a population, including offspring, that is separated geographically from nonexperimental populations of the same species. The experimental population shall be treated as a threatened species, except that, if it is not essential to the continued existence of the species, it is to be treated as a species proposed to be listed, and critical habitat would not be designated. If release of a threatened or endangered species was authorized before October 13, 1982 in a separate geographical area, the Secretary must designate which of these populations are experimental and whether each is essential for the continued existence of the species. § 1539.

Penalties and Enforcement (ESA § 11). Criminal penalties of up to \$50,000 or imprisonment for one year, or both, and civil penalties of up to \$25,000 per violation, may be assessed against a person who knowingly violates, or a person engaged in business as an importer or exporter of fish, wildlife or plants who violates, a provision of the Act or its regulations relating to: importing or exporting, taking, possessing, selling, delivering, carrying, transporting, or shipping after taking; participating in interstate or foreign commerce or any commercial activity of any



endangered species of fish, wildlife or plants in violation of CITES; engaging in business as an importer or exporter of fish, wildlife, plants, or African elephant ivory, or importing into or exporting from other than a designated port without first obtaining permission of the Secretary; soliciting, attempting to solicit, or causing to be committed any prohibited act. Criminal penalties of up to \$25,000, imprisonment of six months, or both, and civil penalties of up to \$12,000 per violation, may be assessed against a person who knowingly violates, or a person engaged in business as an importer or exporter who violates, other regulations issued under the Act. A person who otherwise violates a provision of the Act or a regulation, permit or certificate may be assessed a civil penalty of \$500 per violation. (The maximum criminal fines noted in this paragraph are those stated in the Endangered Species Act; however, the Sentencing Reform Act of 1984, as amended in 1987, increases the fines that may be imposed. See the summary of the Sentencing Reform Act in this Handbook.)

A federal lease, license, permit or other agreement to import or export fish, wildlife or plants, operate a quarantine station for imported wildlife, or use federal lands (including grazing domestic livestock) may be modified, suspended or revoked by the head of the authorizing federal agency upon a criminal conviction under the Act. The Secretary must suspend for up to one year or cancel the federal hunting or fishing permits of a person convicted of a criminal violation under the Act.

No penalty may be assessed without notice and opportunity for a hearing. No penalty can be assessed if the defendant committed an act in good faith to protect himself or herself, a family member or any other person from bodily harm from a threatened or endangered species. Criminal actions are prosecuted in the federal district courts. Civil penalties are imposed by the Secretary, who can ask the Attorney General to bring a civil action in district court if the violator fails to pay the penalty imposed.

Using money received as penalties, fines, or forfeitures of property, the Secretary or the Secretary of the Treasury must pay a reward for information leading to arrest, criminal conviction, civil penalty assessment or forfeiture of property for violation of the Act, unless the information was provided by a local, state or federal employee in the performance of official duties. The monies are to be used also to pay reasonable and necessary costs incurred for the care of fish, wildlife or plant pending disposition of the proceedings. When the balance received exceeds \$500,000, the Secretary of the Treasury is required to deposit an amount equal to the excess into the cooperative endangered species conservation fund.

The Act directs the Secretary, the Secretary of the Treasury and the Secretary in charge of the Coast Guard to enforce the Act's provisions and any regulations or permits issued pursuant to it. In doing so, they may use the personnel, facilities and services of any other federal or state agency. Persons authorized by the Secretaries may: detain and inspect containers and accompanying documents; make arrests without a warrant, but with reasonable grounds; execute and serve arrest, search or other warrants; search and seize, with or without a warrant, as authorized by law. Seized property may be held pending disposition of the proceedings, forfeiture actions may be instituted, or sureties or bonds may be permitted. Abandoned or forfeited property must be disposed of in a manner consistent with the purposes of the Act. All species obtained or transported in violation of the Act and all property used are subject to forfeiture to the U.S. The Secretaries may promulgate regulations to enforce the Act and may charge reasonable fees connected with permits or certificates and the care of seized specimens and evidentiary items. The Attorney General may seek injunctions for violations of the Act.

All laws relating to seizures, forfeitures, and condemnation and disposition of a vessel for violations of a customs law apply to seizures under this Act, except that the powers, rights and duties imposed on an officer shall be exercised by the Secretary or the Secretary's agent.

Any person may file a civil action: to enjoin a person, including a governmental entity, alleged to be in violation of the Act; to compel the Secretary to apply emergency listing procedures or protective measures against the taking of a resident threatened or endangered species within a state; against the Secretary alleging a failure to determine a species as threatened or endangered, or no longer so, if the determination is not discretionary with the Secretary. The district courts have jurisdiction to enforce the Act's provisions and regulations, or to order the Secretary to perform an act or duty. In a civil action, the district court may compel the Secretary to enforce a prohibition if it finds that an emergency exists. Citizen suits to enjoin a person or to compel the Secretary to declare an emergency listing or take protective measures may not be commenced without a 60-day notice given to the alleged violator.

An action may be commenced within the 60-day notification period if the action is alleging that the Secretary is failing to perform a duty respecting an emergency posing a significant risk to the well-being of a species. Suit may be brought in the judicial district where the violation occurs, and, if the U.S. is not a party, the Attorney General may intervene for the U.S. The court may award attorney fees to any party where appropriate. Injunctive relief does not



preclude a party from seeking enforcement or other relief under another statute or common law. The Secretary and the Secretary of Agriculture must coordinate the administration of the Act with the animal quarantine laws. The Act does not limit or supersede the functions of the Secretary of Agriculture or the Treasury relating to prohibitions or restrictions on importation or possession of wildlife or other animals. § 1540.

Endangered Plants (ESA § 12). The Act directs the Secretary of the Smithsonian Institution, in conjunction with other affected agencies, to review plant species which are or may become threatened or endangered, and methods adequate to conserve the species. The Secretary was required to report the results of this review to Congress by December 28, 1974, including recommendations for new or amending legislation. § 1541.

Appropriations Authorized (ESA § 13). Congress authorized to be appropriated \$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 its functions and responsibilities under the Act. Similarly, Congress authorized increasing levels of funding reaching \$6,750,000 each for fiscal years 1991 and 1992 to the Department of Commerce, and up to \$2,600,000 each for fiscal years 1991 and 1992 to the Department of Agriculture for enforcement of plant importation and exportation restrictions. To assist the Secretary and the Endangered Species Committee in carrying out their functions, Congress authorized to be appropriated \$600,000 each for fiscal years 1988 through 1992; and for the Department of the Interior to carry out its responsibilities for the Western Convention, \$400,000 each for fiscal years 1988 through 1990, and up to \$500,000 each for fiscal years 1991 and 1992. § 1542.

Construction with Marine Mammal Protection Act (ESA § 14). Except as provided in the Act, no provision of the Act is to take precedence over more restrictive provisions of the Marine Mammal Protection Act of 1972. § 1543.

Annual Cost Analysis by the U.S. Fish and Wildlife Service (ESA § 15). By January 15, 1990 and yearly thereafter, the Secretary, acting through the Fish and Wildlife Service, must report to Congress on all reasonably identifiable federal and state grant expenditures made primarily for the conservation of endangered or threatened species. §1544.

[Regulations at 50 CFR 17 - Endangered Species Policy Documents provided by the Division of Endangered Species]

Suggested in-text citation and full reference:

(16 U.S.C. 1531 et seq.)

16 U.S.C. §§1531-1544. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884.

