

REAUTHORIZATION OF THE ENDANGERED SPECIES ACT

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ISSUE DEFINITION

The Endangered Species Act of 1973 (P.L. 93-205; 16 USC 1531-1543) is widely regarded by its proponents as one of this country's most important and powerful environmental laws and an international model. Authorization for appropriations to carry out the purposes of the Act under several of its sections expires on Sept. 30, 1982, unless reauthorized in the current session of Congress. Debate on reauthorization reveals divergent views on the relative worth and workability of the Act as seen by conservationists, business groups, State game and fish officials, the Federal Government and others. As the Act is the domestic implementing legislation for U.S. obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), reauthorization debate also addresses these treaty responsibilities, most particularly with respect to export of pelts of American bobcats.

BACKGROUND AND POLICY ANALYSIS

1973-1980

The Endangered Species Act of 1973 (P.L. 93-205; 16 U.S.C. 1531-1543; 87 Stat. 884), as amended, grew out of earlier, simpler acts in 1966 and 1969 (P.L.'s 89-669 and 91-135, respectively. It underwent limited amendment (including reauthorizations) in 1976, 1977, and 1980, and more substantive amendment with respect to section 7, in particular in 1978 and 1979, and with respect to section 8, in 1979. The ESA implements, for the U.S., the Convention on International Trade in Endangered Species of Wild Fauna and Flora (TIAS 8249) signed by the United States March 3, 1973, and the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (50 Stat. 1354; TS 981) signed by the United States Oct. 12, 1940. The 1973 ESA provides:

for the conservation of threatened and endangered species of fish, wildlife and plants by Federal action and by encouraging the establishment of State programs. The Act authorizes the determination and listing of endangered and threatened species and the range in which such condition exists; prohibits unauthorized taking, possession, sale, transport, etc., of endangered species; provides authority to acquire land for the conservation of listed species with land and water conservation funds; authorizes establishment of cooperative agreements and grant-in-aid to those States which establish and maintain an active and adequate program for endangered and threatened wildlife; and authorizes the assessment of civil and criminal penalties for violating the Act or regulations. Section 7 of the Endangered Species Act requires Federal agencies to insure that any action authorized, funded or carried out by them does not jeopardize the continued existence of listed species or modify their critical habitat. Public Law 94-325, approved June 30, 1976 (90 Stat. 724), extended and increased the authorization of appropriations in section 15 of the 1973

Act. Public Law 94-359, approved July 12, 1976 (90 Stat. 911), exempted under certain conditions whale parts and products lawfully held prior to December 28, 1973, from the prohibitions in the Act and provided other amendments to facilitate administrative processes in emergency situations, clarified enforcement procedures, allowed disposal of forfeited and abandoned property and clarified the definition of "commercial activity." The authorization of appropriations for Federal grant-in-aid to States was extended by Public Law 95-212 on December 19, 1977 (91 Stat. 1493). Public Law 95-632, signed by the President on November 10, 1978 (92 Stat. 375), extended the section 15 authorization of appropriations through March 31, 1980, and made extensive revisions in the 1973 law. A Cabinet-level Endangered Species Committee was established as part of a two-tiered process whereby Federal agencies may obtain an exemption from the requirements of section 7. The Tellico Dam project in Tennessee and the Grayrocks project in Wyoming were to receive expedited consideration by the Committee. The Secretary of Defense is authorized to specify exemptions from the Act for reasons of national security. The consultation process under section 7 was formalized and strengthened, and now includes the requirement that a Federal agency prepare a biological assessment in cases where the Secretary has advised that a listed species may be present. The 1978 amendments also oblige the Secretary to consider the economic impact of designating critical habitat and to review the list of endangered and threatened species every five years. Public notification and hearing requirements prior to the listing of a species or its habitat are specified. Other changes made by the 1978 statute include: a provision for cooperative agreements with States for the conservation of endangered and threatened species of plants; exemptions from the Act's requirements for the progeny of legally held captive raptors and antique articles made before 1830; and a revision of the penalty provisions of the Act. (Office of Legislative Services, U.S. Fish and Wildlife Service, Department of the Interior. Selected List of Federal Laws and Treaties Relating to Sport Fish and Wildlife. Revised January, 1979).

Public Law 96-159, signed by the President on Dec. 28, 1979, authorized appropriations to fund sections 7 and 15 of the Act through FY82. In addition to provisions for funding endangered species work of the Department of Commerce and Interior, this Act authorized appropriations to support Endangered Species Committee and review board functions (under section 7) for FY80-82. Appropriations were also authorized for the first time for the Department of Agriculture to facilitate enforcement of both the Act and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) with regard to the importation and exportation of terrestrial plants. The 1979 Amendments designate the Interior Secretary as the Endangered Species Scientific Authority (ESSA) under CITES. Formerly, ESSA was a 7-member independent panel with regulatory authority, but not accountable to any public official. The 7-member panel, stripped of regulatory authority, remains as the International Convention Advisory Commission (ICAC). The Secretary now has the enforcement authority ESSA formerly had, but if the Secretary rejects ICAC recommendations, reasons must

be published in the Federal Register. Finally the 1979 Amendments made a number of revisions in the ESA about public meetings, notice requirements, status reviews, critical habitat notifications, consultation requirements of Federal agencies, and other administrative matters. The jeopardy standard under section 7 was changed from "would jeopardize" to the more flexible "is likely to jeopardize." The deadline for the sale of scrimshaw was extended under the amendments for three more years in cases where whale parts and products were in stock prior to 1973.

Public Law 96-246, signed by the President on May 23, 1980, authorized appropriations for cooperative endangered species programs with the States through FY82. Thus, appropriation authorizations for sections 6, 7, and 15 of the ESA were placed on the same expiration time frame, all expiring on Sept. 30, 1982, if not reauthorized.

More detailed information on the issues and legislative history of the ESA through 1980 can be found in the CRS Archived Issue Brief IB79601 -- Wildlife and Fisheries: Endangered and Threatened Species.

Present Issues

Despite the major oversight review conducted and the substantive changes in the 1973 Act enacted by the 95th and 96th Congress, there remain a number of aspects of the law and/or its administration which are not wholly satisfactory to one or more of the numerous interested parties. Principal among them are:

Taxa of species ("kinds of organisms") covered

Under the present law, any species or subspecies of animals or a population of a vertebrate animal that is threatened with extinction can be protected. Some interests would like the Act amended to restrict its coverage to the "higher life forms"-- usually the chordates (principally vertebrates) among animals, and seed plants and ferns among plants. In addition, some of the interests propose to eliminate protection for any taxonomic category lower than full species -- i.e., subspecies and populations. Conservation interests and biologists generally favor keeping potential protection inclusive of all forms of life and of sub-specific taxonomic levels, too.

Section 7 provisions

From its inception this has been a controversial section of the Act. It prohibits Federal agencies from carrying out public projects or issuing permits for private projects that would either jeopardize listed species or harm their habitat. Agencies prepare a "biological assessment" (which may be time-consuming and costly) which supports their conclusion about whether a proposed project would affect any listed species. If harmful affects are anticipated, the agencies must consult with the appropriate Secretary (Commerce or Interior) who then issues an opinion on whether the project would "jeopardize" a species and who identifies alternative ways to effect the project or its purposes. If the Federal agency, a State governor, or a project sponsor disagrees with the Secretarial opinion, a request for an exemption may be filed under procedures Congress established in the 1978 Amendments. Some groups, including those in oil and gas, mining, and utility industries, consider the 1978 Amendments do not go far enough, and believe the Act still either blocks needed economic development, or imposes excessive

economic burdens for industrial compliance. Opponents to the present language would prefer to have agency compliance made discretionary or otherwise limit the kinds of Federal activities to which the section applies. Supporters of the present language, while agreeing administration of it can be improved, argue the section has worked well, has provided for conservation efforts which are compatible with development, and deny that it has really interfered with economic development. Some supporters of present Section 7 provisions believe the failure of the Departments of Commerce and the Interior to promulgate final regulations for implementing Section 7 is actually a part of the problem some have with the section. They see administrative action remedying this alleged source of confusion, not legislative action.

Bobcats

The bobcat is not listed on the U.S. list of endangered or threatened species. However, it is listed on Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the appendix which covers species judged in risk of becoming endangered unless international trade is regulated. The treaty stipulates that export of such listed species can be granted by a signatory nation only if it is not detrimental to the survival of the species. Attempts by the U.S., through the Fish and Wildlife Service, to issue such export permits have been blocked in the Federal courts by the Defenders of Wildlife on grounds the Government data on bobcat populations and harvests are inadequate to determine whether such export is or is not detrimental to the species' survival. State game management agencies, represented by the International Association of Fish and Wildlife Agencies, favors amending the Act to modify the data requirements as interpreted by the Federal courts, and/or to assign responsibility to the States for making the determination of whether exports are detrimental or not. The State agencies maintain they, not the Federal Government, are best equipped to set harvest quotas and make biological status determinations. Environmental groups in opposition charge the State game agencies have a vested interest in loosening export standards, as such agencies depend, in part, on funding from hunting, fishing and trapping licenses. They believe the international treaty obligations of the U.S. under CITES are properly a matter for Federal assurance.

Length of reauthorization

There is disagreement over the period of reauthorization. The length of reauthorization affects how soon and in what political climate debate and political decisions are made over substantive changes in the Act. Most environmental groups and scientists prefer a long reauthorization to avoid annual attacks on the controversial act each time it is reauthorized. Many industries, concerned about stoppage or delay of economic development projects, favor keeping the Act on a short leash--unless they obtain the substantive changes in the Act which they favor. Secretary of the Interior Watt wrote to the chairmen of the House and Senate Subcommittees which oversee the Act, and which consider reauthorization measures, in favor of a one-year reauthorization without extensive amendment. Meanwhile, the Commerce Department's National Marine Fisheries Service was cleared by OMB to testify in favor of a 2-year reauthorization without amendments. Senator Chafee, chairman of the Senate Environment's Environmental Pollution Subcommittee, is reported drafting a multi-year reauthorization measure. His counterpart in the House, Congressman Breaux of the Fisheries and Wildlife Conservation and the Environment Subcommittee of the Merchant Marine and Fisheries Committee, is reported considering either one or two-year

reauthorizations.

Budgetary impacts

Concern with reauthorization of appropriations for the Endangered Species Act is inevitably intertwined with concern for actual appropriations and expenditures. The Administration has proposed a FY 83 budget for the Fish and Wildlife Service's endangered species program of \$16,550,000 which is about 7% below last year's level. The proposed budget would reduce the Endangered Species Office's law enforcement activities by \$880,000, mostly by reducing by about 40, the over 200 law enforcement agents carrying out ESA work to 160 agents. Also, the Administration proposes zero funding under Section 6 for Federal-State cooperative endangered species program work. Additionally, the National Marine Fisheries Service's endangered species program is proposed to be reduced by over \$500,000 to less than \$2.5 million in FY 83. It can be assumed the reauthorizing committees will seek to influence appropriations and obligations of the Administration with respect to endangered species work.

Highlights of the Endangered Species program budget categories are shown in the following table.

	FY 1981 Actual	FY 1982 Estimate (in thousands)	FY 1983 Request
Listing	\$4,101	\$1,957	\$1,991
Protection	5,470	5,605	4,679
Consultation	2,579	2,413	2,434
Maintenance/Recovery	6,713	7,588	7,446
Grants (to states)	3,920	-0-	-0-
TOTAL	\$22,783	\$17,563	\$16,550

Other issues

Reauthorization measures may include proposed changes affecting listing and delisting of species as endangered or threatened; the role of economics in determining whether species should be listed as opposed to determining how much should be done to protect them; designation of critical habitat; and degree of "intent" to be shown for prosecutions of "takings" of listed species.

LEGISLATION

S. 2309 (Chafee, Mitchell, and Gorton)

Authorization of Appropriations Under the Endangered Species Act of 1973. Amends the Endangered Species Act of 1973, as amended; to encourage species listings by requiring that the Secretary of the Interior decide within two years whether or not to list a proposed species; to clarify States' responsibilities for managing non-endangered resident species by not requiring the Secretary of the Interior when making non-detriment decisions in accordance with CITES to use population estimates if these are not the best available biological data; to eliminate possible conflict between section 7 and section 9 of the Act by exempting taking violations that are

made in the course of activities addressed by a biological opinion under section 7; to encourage new populations of endangered species by treating non-essential experimental populations, to the extent that they are not on national wildlife refuges, as proposed species, thus excluding them from critical habitat designation, the section 7 jeopardy standard, and the section 9 taking prohibition; to streamline the section 7 exemption process by substituting the Secretary of the Interior or of Commerce, as appropriate, for the Review Board and shortening the process from 360 to 200 days; to reauthorize the Act for 4 years at current levels: \$27 million for DOI, \$3.5 million for Department of Commerce, \$1.85 million for Department of Agriculture, \$6 million for the States under section 6; to change the Federal share of matching grants to the States from 662/3 to 75%; and to give the Attorney General injunctive authority.

S. 2310 (Chafee, by request)

Amends the Endangered Species Act of 1973, to authorize funds for fiscal years 1983 and 1984, and has other purposes.

Both bills were introduced Mar. 30, 1982; referred to Committee on Environment and Public Works.

HEARINGS

U.S. Congress. House. Committee on Merchant Marine and Fisheries. Subcommittee on Fisheries and Wildlife Conservation and the Environment. Oversight and Reauthorization of the Endangered Species Act. Hearings, 97th Congress, 2d session. Feb. 22, Mar. 8, 1982. Not yet printed

U.S. Congress. Senate. Committee on Environment and Public Works. Subcommittee on Environmental Pollution. Endangered Species Act Oversight. Hearings, 97th Congress, 1st session, Dec. 8, 10, 1981. In press

U.S. Congress. Senate. Committee on Environment and Public Works. Subcommittee on Environmental Pollution. Reauthorization of the Endangered Species Act. Hearings, 97th Congress, 2d session, scheduled for Apr. 19 and 22, 1982. Not yet held

REPORTS AND CONGRESSIONAL DOCUMENTS

U.S. Congress. Senate. Committee on Environment and Public Works. Subcommittee on Environmental Pollution. A legislative history of the Endangered Species Act of 1973, as amended in 1976, 1977, 1978, 1979 and 1980. February 1982. Washington, U.S. Govt. Print. Off., 1982. 1,506 p.

At head of title: 97th Congress, 2d session. Committee Print.

"Serial no. 97-6"

CHRONOLOGY OF EVENTS

- 09/30/82 -- Authorization for appropriations for carrying out the proposes of the Endangered Species Act of 1973, as amended, expires.
- 04/19/82-04/22/82 -- Hearings scheduled before the Environmental Pollution Subcommittee of the Senate Environment and Public Works Committee on legislation (to be introduced) to reauthorize the Endangered Species Act of 1973, as amended.
- 03/08/82 -- Oversight hearing on reauthorization of the Endangered Species Act of 1973, as amended, held by Fisheries and Wildlife Conservation and the Environment Subcommittee of the House Merchant Marine and Fisheries Committee.
- 02/22/82 -- Ditto
- 12/08/81 and 12/10/81 -- Oversight hearings on reauthorization of the Endangered Species Act of 1973, as amended, held by the Environmental Pollution Subcommittee of the Senate Committee on Environment and Public Works.

ADDITIONAL REFERENCE SOURCES

- Center for Environmental Education. Endangered Species Act Reauthorization Bulletin, No. 1, 9 December 1981; no. 2, 18 January 1982; no. 3, 16 February 1982; no. 4, 8 March 1982.
- Holden, Constance. Endangered Species Act in Jeopardy. Science, v. 215, Mar. 5, 1982: 1212-1214.
- U.S. Department of the Interior. Fish and Wildlife Service. Endangered Species Program. Endangered Species Technical Bulletin, v. 7 (1), January 1982: 1,3,6,8.
- U.S. Library of Congress. Congressional Research Service. Endangered Species Act and CITES (by) William C. Jolly. Dec. 21, 1981. Washington, 1981. 5p.
- U.S. Library of Congress. Congressional Research Service. Wildlife and Fisheries: Endangered and Threatened Species (by) William C. Jolly and Judy L. Sheppard. Archived Issue Brief 79061.