Team No. 57

ORAL ARGUMENT SCHEDULED ON FEBRUARY 23, 2017

Docket No. 16-0933
(And Consolidated Cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CORDELIA LEAR,
Plaintiff-Appellee-Cross Appellant

v.

UNITED STATES FISH AND WILDLIFE SERVICE,
Defendant-Appellee-Cross Appellee,

AND

BRITTAIN COUNTY, NEW UNION,
Defendant-Appellant

On Consolidated Petitions for Review of Final Action
by the United States Fish and Wildlife Service

BRIEF OF APPELLANT
THE UNITED STATES FISH AND WILDLIFE SERVICE

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JURISDICTIONAL STATEMENT

The consolidated petitions for review of the final agency ruling of the United States Fish and Wildlife Service (hereinafter "FWS") were timely filed in this Court pursuant to 42 U.S.C. § 7607(b).

STATEMENT OF THE ISSUES

I. Whether Public Trust Principles Inherent in Title Preclude Lear's Taking Claim Based on the Denial of a County Wetlands Permit.

II. Whether the ESA is a Valid Exercise of the Commerce Power, as Applied to a Wholly Intrastate Population of an Endangered Butterfly.

III. Whether Lear's Takings Claim Against FWS is Ripe Without Having Applied For an Incidental Take Permit (ITP).

IV. Whether the Relevant Parcel for Takings Analysis is the Entirety of Lear Island, or Merely the Cordelia Lot as Subdivided in 1965.

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VII. Whether the ESA and the Brittain County Wetlands Preservation Law Should Be Considered Separately in Evaluating Deprivation of Economic Value.

STATEMENT OF THE CASE

This is a response petition for judicial review of the final agency action of United States Fish and Wildlife Service ("FWS"), which the Circuit Court properly assessed as in accordance with law and entitled to deference. The FWS properly applied the protectionist provisions of the Endangered Species Act ("ESA") by halting development of municipal wetlands upon Plaintiff-Appellee's property on Lear Island, in Brittain County, New Union to protect the undisputedly endangered Karner Blue Butterfly ("Species"). The property in question is referred to as "Heath" has been in the possession of the Plaintiff's family for generations, and is uniquely

situated upon an access strip covered with wild blue lupine flowers, which are essential to the Species' survival. This ideal habitat for the Species resulted in FWS' designation of the Heath as a critical habitat in 1978. It was not until 2012, an excess of thirty years after the FWS designation, that any member of the Lear family protested the designation or sought development approval at the local or federal level.

Upon this 2012 inquiry into development, FWS properly informed the Plaintiff that any disturbance of the Heath other than its as-maintained conditions would constitute an undisputed 'taking' under federal law. Accordingly, Plaintiff was informed of her procedural right to file for the requisite Incidental Take Permit ("ITP") to seek development of the Heath - a right which she neither pursued or exercised. Because Plaintiff took no further action to secure the requisite permits and legal protections to develop the municipal wetlands, the only final agency action which a court may interpret is FWS's listing of the Species, and its protection of these same. As both of the actions are in accordance with the expressly delegated powers of FWS, there is no constitutional or regulatory issue at bar that would necessitate FWS' actions as an unconstitutional or uncompensated taking of the Heath property.

STATEMENT OF FACTS

It is undisputed that the Karner Blue Butterfly ("Species") is an endangered species, and has not been removed from the endangered species list since its adoption on December 14, 1992. 50 C.F.R. § 17.11 (2015). Likewise, it is undisputed that the sole remaining population of the Species in New Union exists on the Heath. The Species does not migrate, making the remaining populations critical to the endurance of the species, and any proposed relocation wholly problematic. The Species' larvae remain attached to the lupine plants for their gestation period

through fall and winter until they hatch in spring. Any disturbance during this larval period would result in the certain death of the Species brood.

In the aforementioned actions of FWS, the Plaintiff was fully informed of her procedural right to pursue an ITP and seek the regulatory right to develop her property. Inherent to any ITP for consideration by the FWS is a required Habitat Conservation Plan ("HCP"). The HCP for the Heath property would require, *at a minimum*, that the Plaintiff commit contiguous lands similarly suited to serve as a conduit habitat for the Species, were she to develop. This requirement was reiterated to the Plaintiff in her written communications with FWS, which were then adopted into the administrative record for the District Court's review.

The Inadequacy of the Proposed Alternative Development Plan.

Plaintiff did not file an ITP, but rather pursued an alternative development proposal ("ADP"), which purportedly would not disturb the lupine fields, the Species' habitat, or the Species. The Plaintiff's proposed ADP sought to convert a one-half (1/2) acre of the adjacent marshland as a lupine-free building site, with a designated access point diverting from the Heath lands. This proposed alternative paled in comparison to the 40,000 square feet of the Cordelia Lot that the Plaintiff sought to develop for residential use. Critically, the Cordelia Lot is roughly an acre of maintained land requisite to sustain the Species; and the very alternative proposed is not only half the present surface area, but a wholly separate area from where the Species has cultivated its habitat. To then contrast this alternative figure against the nine-acre open field of what is designated as "the Heath," represents that Plaintiff proposed to designate *less than one-half of one percent (precisely 0.056%),* of the land the Species occupied undisturbed for over thirty (30) years for a non-essential residential development. This proposed ADP required a permit to fill the to-be-designated cove-marsh. While this region of the Cordelia Lot is not

recognized by the U.S. Army Corps of engineers as a 'navigable water,' that designation bears no effect upon the ESA's administration. In the matter at bar, the designation merely represents a shift in requisite agency review from the federal review of the U.S. Corps, to the local government agency of the Brittain County Wetland Preservation Law. Plaintiff filed her permit with the Brittain County Wetlands Board in August of 2013, which was properly denied in December of that same year as it met none of the local government permitted uses for wetlands filling.

The Maintenance of the Heath Property as Integral to Species Survival.

Plaintiff and her familial successors regularly mowed the Heath annually in the month of October. Without this action, the fields upon the Heath and adjacent Cordelia Lot would convert to a successional forest which would result in the demise of the Species, the same as a residential development would. The chain of title is no saving grace to this present condition of the land. While the Lear's assumed title to the land in the 1803 Lear Island Grant, whereby King Lear retained sole ownership of the lands until his death in 2005. While the lands were subdivided into horizontal tracts, this designation served no purpose, as the agricultural use of some of the lands ceased soon after the subdivision, and the properties were conveyed to Lear's heirs who maintained their same uncultivated character for decades – thereby allowing the lands to be the ideal and only suitable location for the Species. Notably, Plaintiff failed to supply the lower court with details regarding the date of the deeds, or the date of her sibling's construction of a residence upon their portion of the lands. Nonetheless, it is undisputed that the local planning and zoning restriction in place upon the development of adjacent tracts of the Lear property were vastly different in time and circumstance from the matter at bar.

SUMMARY OF THE ARGUMENT

The public trust doctrine and the basic tenants of common law property's 'bundle of rights' preclude Lear's takings claim, and in fact the real take at issue is the eminent taking of the Kaner Blue. The Fifth Amendment to the U.S. Constitution proscribes the taking of private property for public use, without just compensation. U.S. Const. amend. V, cl. 4. Accordingly, the very existence of a takings provision for the benefit of the public trust, as well as the Congressional approval and enactment of a number of environmental protection acts and agencies (chiefly, the ESA and FWS), renders trivial any assertion by the Plaintiff that the FWS or ESA acted outside the confines of constitutional authority. Plaintiff's assertion that a denial of a county wetlands permit constitutes an unconstitutional taking is facially invalid, especially as she has no inherent ownership rights over the natural water resources. FWS is *required* to list endangered species (and correspondingly, their habitats), in order to fulfill the stated purpose of the ESA. Further, the goal of protecting wetlands is symbiotic in nature: it supports, and is supported by, the public trust doctrine.

Congress enacted the ESA to create a comprehensive scheme to regulate activities that substantially affect interstate commerce. The Karner Blue Butterfly population of New Union, while existing solely on the Heath of Lear Island, fits comfortably within the larger statutory scheme for habitat and species preservation, and the overall economic impacts resulting form the same. As economic impacts are triggered due to the research, preservation, and federal funding of the overall ecological regime of the U.S., the Commerce Clause properly allows for any federal agency to regulate activity of even an entirely intrastate endangered population. The ESA is therefore a valid exercise of Congress's Commerce power as applied to a wholly intrastate population validly listed as endangered under the regulatory requirements of the ESA. The

Supreme Court has found that when Congress enacts a comprehensive regulatory scheme, even intrastate non-economic conduct can be regulated as part of that scheme.

Furthermore, the underpinning sub-issues regarding Ms. Lear lack of standing to bring this suit should persuade this court to uphold findings in favor of FWS. Any taking claim is not yet ripe for review, as Plaintiff has not applied for an ITP, as required by the ESA. Until the claim is ripe, the Plaintiff does not have standing – as no final agency decision has been made by FWS on this matter. Without a final agency decision, the claim cannot be ripe. Correspondingly. the relevant parcel for analysis of any takings claim is the entirety of Lear Island, not just the Cordelia Lot. Applying the well-established threshold factors for affected area parcels in takings analysis, the relevant parcel for this court to consider, were it to find a taking has occurred, is the entirety of Lear Island – especially as the island has historically been contemplated as a whole parcel for well over a century.

Were the aforementioned issues to be resolved in favor of the Plaintiff; this court would still be unable to find a taking has occurred, as Plaintiff's property has not been deprived of all economic value, or productive use. Not under a single one of the three separate theories Plaintiff advances is she able to prove that her property meets the requisite 'worthlessness' standards for a taking. The property has current economic value derived of rights that Ms. Lear enjoys for non-commercial property, together with the retained right to develop the property in approximately ten years. While her rights may be *diminished*, they are by no means depleted. Notably, the Plaintiff has a standing offer for $1,000 per year from the Brittain County Butterfly Society. In exchange for this sum, which will almost certainly exceed her annual property tax obligation once she has the property reassessed, she need only provide access to the property. Additionally,

she has the opportunity to seek other income generating uses for her property, including the ability to apply for a permit to develop the one-acre wetland for *any* water-related use.

Finally, Ms. Lear has not suffered an indivisible injury because the impact of FWS and Brittain County regulations can be allocated to the respective authority. While this court is to review these issues on consolidated petition, this court may not impute the net impacts of administration of law as a zero sum in favor of only the Plaintiff. Accordingly, this court should find in favor of FWS, as their actions were wholly in accordance with law and did not rise to injure the Plaintiff such to be a taking of her property, or her rights derived from ownership.

STANDARD OF REVIEW

Under section 706 of the Administrative Procedure Act ("APA"), FWS' decision is presumed to be valid and is entitled judicial deference. *Sierra Club v. Jackson,* 833 F. Supp. 2d, 11, 17-18 (D.C. Cir. 2012). A Court will only reject a final agency action if that action is not in accordance with law, as 'arbitrary' or 'capricious,' demonstrating an 'abuse of discretion.' 5 U.S.C. § 706(2)(A) (2012). This court will review *de novo* FWS' decision to protect the Karner Blue, and may only find the agency's actions impermissible where they are unsupported by the administrative record, as evaluated in the findings of the lower court as reasonably discerned. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007).

ARGUMENT

I. Whether Public Trust Principles Inherent in Title Preclude Lear's Taking Claim Based on the Denial of a County Wetlands Permit.

The public trust doctrine and the basic tenants of common law property's 'bundle of rights' preclude Lear's takings claim, and in fact the real take at issue is the eminent taking of the

Kaner Blue. The lower court is correct in its assessment that any limitation on filling or developing lands under water are comfortably within the purview of the public trust doctrine.

A. The Strength of the Public Trust Doctrine.

The public trust doctrine has been linked to the public's right to access and conserve water resources since the legal framework of Ancient Rome and the Justinian Empire. The scrutiny of water resources as inextricably linked to the public interest was contemplated in the Magna Carta, the United States Constitution, and subsequently endorsed by Congress in the Clean Water Act, the Endangered Species Act, and the National Environmental Policy Act. It is no coincidence that the body of laws which serve as the literal and figurative bedrock of this country's environmental protections each include a consideration for the public interest, and where that awareness extends to a vested property interest.

The laws of England, which restricted the public's ability to fish or navigate waters, quickly became the province of the United States' common law, as recognized in Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892). The court in *Illinois Central* resolutely concluded that the common law public trust doctrine prevented the government from alienating the public right to the lands under navigable waters, whereby impliedly reasoning that public trust applies to both waters influenced by the tides, and waters that are navigable in fact. The right to water and access to water is greater than the public trust, but rather, is the very foundation by which this country has come to assess land ownership and the right to any natural resources thereon; as is exemplified in the manner in which our country defines water rights as riparian or littoral.

Preservation of the public trust as a whole defense to takings claims can be implied from a long line of environmental preservation case findings. See Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 980-81 (9th Cir. 2002). There, the U.S. Court of Appeals for the Ninth Circuit reasoned that the tidelands were subject to the public trust and, therefore, the owner could

claim no entitlement to erect structures in the tidelands for private development purposes. Similar to the case at bar, there has been a refusal of a local permit to allow for construction of residences due to the very same contemplation for the public interest. Further, In *McQueen v. South Carolina Coastal Council*, a landowner claimed a taking based on the South Carolina Coastal Council's refusal to allow the filling of two coastal lots, which had been dry land when the claimant purchased them, but had gradually turned into submerged wetlands due to erosion. McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 118-19 (S.C. 2003). The Court therein expressly stated that once the lots became submerged, they were subject to the applicable ***local and federal laws*** and the common law principles of the public trust doctrine. As is the case at bar, the chain of title to the Cordelia Lot bears no implication of the conditions of it at the time the owners applied for a permit, or the lawful denial of the same; it is undisputed that the Lot lies upon wetlands, and that wetlands are contemplated as within the public trust.

Finally, in *National Association of Homebuilders,* the court rejected a takings challenge to a state agency rule, which required developers of waterfront property to provide walkways along the water. Nat'l Ass'n of Homebuilders v. N.J. Dep't of Envtl. Prot., 64 F. Supp. 2d 354, 356, 360 (D. N.J. 1999). The court reasoned that the area on which the walkways would be constructed was subject to the public trust doctrine and, therefore, the claimant had no entitlement to exclude members of the public seeking to use the area for recreation — an activity which fell within the scope of the New Jersey public trust doctrine. Insofar as the federal courts overwhelmingly contemplating the application of the public trust to private lands, this case stands tantamount to the one at bar; as the court in *National Association of Homebuilders* denied a taking of lands ***adjacent*** to a natural resource.

B. The Public Trust and the Fifth Amendment.

The Fifth Amendment to the U.S. Constitution proscribes the taking of private property for public use, without just compensation. U.S. Const. amend. V, cl. 4. *See, e.g.,* Palmyra Pac. Seafoods, L.L.C. v. United States, 561 F.3d 1361, 1364-65 (Fed. Cir. 2009); Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1372 (Fed. Cir. 2004); *see also* Air Pegasus of D.C., Inc. v. United States, 424 F.3d 1206, 1212-13 (Fed. Cir.2005). When evaluating whether governmental action constitutes a taking, a court employs a two-part test: (i) first, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking; (ii) second, if the court concludes that a cognizable property interest exists, it determines whether the government's action amounted to a compensable taking of that interest. "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law." *See* Phillips v. Wash. Legal Found., 524 U.S. 156, (1998) (internal quotations and citation omitted); *see also* Maritrans Inc. v. United States, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (noting that "'existing rules and understandings' and 'background principles' derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking").

Here, there is no doubt that the applicable takings analysis is one for *per se* takings, as a physical appropriation of property has been identified as within the purview of the local government framework, and subsequently the federal government by proxy of the FWS. See Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 318-20 (2001). The primary authority for analyzing takings analysis as within the public trust doctrine overlay stems from California case law. Notably, appropriative water rights are viewed as property under

California law, and those rights are limited to the 'beneficial use' of the water involved, as is the broach characteristic of any littoral water rights jurisdiction. No such state-adopted water rights are implicated in the case at bar, so for appellants to state that the local government framework is in and of itself a taking is reaching at best. Even in a littoral system, California courts find the beneficial use limitation a valid exercise of state power to regulate water rights for public benefit and deem it an overriding constitutional limitation on those rights. *See* Casitas Mun. Water Dist. v. United States, 708 F.3d 1340, 1342 (Fed. Cir. 2013). This jurisdiction is silent on the express property right of the water at issue within the Cordelia Lot, however, it can be implied from the fact that a permit was applied for and denied, that no descendant ever owned the waters upon the lot in fee.

C. Threshold Takings Considerations.

The lower court was correct in its assessment that the infamous Lucas case is implicated in takings analysis, but it has conflated the necessary context of Lucas. Therefore, The first question is how to correctly define "background principles" in the context of a regulatory takings case. This Court's decision in Lucas v. South Carolina Coastal Council 505 U.S. 1003, 1029 (1992), finds that these principles represent inherent limitations on the scope of private property interests, which defeat takings claims by barring plaintiffs from claiming ownership of "property" that could potentially support takings claims. Simply put, if a regulation does not impinge on a property entitlement that a plaintiff can properly claim under state or federal law, the takings claim fails at the outset. As is the case at bar, the public trust doctrine itself, coupled with the local laws in effect over the Cordelia Lot, bar the plaintiffs from having any inherent ownership rights over the natural water resources thereon – regardless of the local regulatory framework of the water basins as riparian or littoral. Furthermore, when a regulatory restriction advances a resource protection goal, and that goal parallels the restrictions on private ownership

of water imposed by the public trust doctrine, the doctrine serves as a complete defense to a takings claim based on the regulation.

II. Whether the ESA is a Valid Exercise of the Commerce Power, as Applied to a Wholly Intrastate Population of an Endangered Butterfly.

The Commerce Clause permits Congress to regulate three broad categories of activities: (1) channels;(2) instrumentalities; and (3) activities that substantially affect interstate commerce. United States v Lopez, 514 U.S. 549 (1995). Congress enacted the Endangered Species Act ("ESA") to create a comprehensive scheme to regulate activities that substantially affect interstate commerce. The Karner Blue Butterfly population of New Union, existing solely on the Heath of Lear Island, bears no economic value in its habitat, yet fits comfortably within the larger statutory scheme for habitat and species preservation. Therefore, its regulation is a valid exercise of the Commerce Clause.

A. The Karner Blue's Non-Economic, Intrastate Existence Should be Regulated Under the Commerce Clause Given the Larger Statutory Scheme.

The Supreme Court has evaluated the critical element of objective economic value as a core component to Commerce Clause regulation, even of purely intrastate activity. The cornerstone of this economic purpose test is best exemplified in Gonzales v Raich, 541 U.S. 1 (2005), in which the Court held that an act seeking to prohibit the sale of illegal drugs can also regulate the growth of intrastate illegal drugs grown for no economic purpose. In Raich, defendants grew and used marijuana for medicinal purposes, without ever entering it into interstate commerce. Crucially, even though the drugs being cultivated in Raich were never to be sold, bartered, or traded, and were for the sole consumption of the grower-party; the absence of an economic impact upon others in the state did not remove the State's ability to regulate the use and cultivation of the drugs, because it fit comfortably within the larger regulatory regime of drug administration and regulation. The Controlled Substance Act (CSA) prohibited such use,

and defendant claimed that the Act was unconstitutional. Despite the claim that the Act was unconstitutional, the Court held that the regulation of this activity was permitted, despite being non-economic in nature. Id. The Court held that Congress can regulate an activity exclusively within a sovereign state, where that activity will have a substantial effect on interstate commerce. Id. It would be too difficult to regulate the use of marijuana in interstate use if Congress could not regulate this type of non-economic, intrastate use as well.

In the case at bar, the regulation of the Karner Blue Butterfly will have a calculable effect on the regulation of the entire ESA. Congress enacted the ESA with the stated purpose to protect habitat destruction and the disappearance of species. H.R. Rep. No. 93-412, at 2 and 4 (1973). The safety of endangered species is inextricably tied to its surrounding habitats. The Fish and FWS designated appellant's entire lot as a critical habitat for the subpopulation of Karner Blue Butterfly. It was so listed due to the lupine fields present on the lot, which provide necessary shade and conditions for larval survival. By permitting appellant to develop her lot, this Court would permit the destruction of this critical habitat as designated by the FWS. In doing so, this Court would ultimately undermine Congress's intent in enacting the ESA. The regulation of any taking of the Karner Blue Butterfly would, however, further the mission and purpose of the ESA.

While this is general applications of Congress's power under the Commerce Clause, the Court has held that intrastate activities that are non-economic in nature may be regulated if the overall statute regulates an economic activity. Therefore, because the Blue Karner Butterfly is connected to a valid regulation of economic activity, it too can be regulated under the Commerce Clause. The lower court properly ruled on this issue, and therefore, its decision should be affirmed in this Court.

B. Courts Have Routinely Held that Intrastate Species With No Economic Value may be Regulated Under the ESA.

While the decisions discussed above apply to issues outside of the regulation of species under the ESA, lower courts have also applied these principles when deciding ESA specific cases. In applying these ESA specific cases, and because the regulation of the Blue Karner Butterfly is essential in keeping with Congress's intent of the ESA, the prohibition of its taking should be affirmed as constitutional. Regulation of a species located wholly intrastate and possessing no economic value is constitutional if such a regulation is connected and essential to the overall efficacy of the ESA. GDF Realty Investments, LTD. v. Norton, 326 F.3d 622, 639 (5th Cir. 2003). In GDF Realty Investments, investors sought the commercial development of an area in which an endangered species inhabited. Id. at 624. The court held that the ESA, by analyzing legislative history, does regulate economic activities. Id. at 639. Furthermore, the court held that regulation of this particular species was essential to the overall scheme of the ESA. By excluding the species from protection, the court would "undercut" the purpose of the ESA and threaten the entire ecosystem, which is in direct opposition of Congress's intent of the ESA. Id. at 640. Therefore, the regulation of an intrastate and non-economic species is constitutional under the Commerce Clause based on application of legislative history and a functional application of the provision and its effect on the Act as a whole.

Similar to GDF Realty Investments, appellant seeks to develop land in which an endangered species inhabits. As discussed above, the ESA does regulate economic activities through prohibiting the trade and sell of animals across state lines. Next, it must be determined if the regulation of the Karner Blue Butterfly is essential to the overall scheme of the ESA. As previously discussed, its regulation is essential, and therefore, regulation of its taking is constitutional under the Commerce Clause. Again, the congressional intent of preventing habitat

destruction and the disappearance of species would be undermined if appellant were permitted to take the Karner Blue Butterfly through development of her lot. H.R. Rep. No. 93-412, at 2 and 4 (1973).

Therefore, by applying the above decisions to the specific case at hand, it is clear that the overall efficacy of the ESA would be greatly disrupted by forgoing the regulation of the Karner Blue Butterfly. And, as several courts have held, this type of disruption can be prevented through proper regulation, thus, the regulation of the takings of the Karner Blue Butterfly, a non economic, intrastate species, is constitutional under the Commerce Clause. Using these analyses of congressional intent and court decisions, the lower court's decision in regards to the constitutionality of regulating the Karner Blue Butterfly pursuant to the ESA should be affirmed.

III. Whether Lear's Takings Claim Against FWS is Ripe Without Having Applied For an Incidental Take Permit (ITP).

Because Lear failed to apply for an ITP, the takings claim lacks ripeness, and the lower court's decision should be reversed. Despite any type of exclusions that appellant has attempted to argue, the FWS has not issued a final decision, and this issues is therefore not ripe. Without a final agency decision, no court can determine if a takings as occurred, thus, the lower court's decision should be reversed as Lear's Fifth Amendment rights were not violated.

A. Lear's Takings Claim Against FWS is Not Ripe Because She Has Not Applied For an ITP and Therefore No Final Decision Has Been Issued by The FWS.

In order for a takings claim to be ripe, an agency regulating the property owner's land must have issued a final decision in regards to the permit. Meaning, a permit, such as an ITP permit, must have been applied for by the property owner and denied before the owner can assert a takings claim. Because Lear has only inquired about permits and investigated the costs associated with preparing an HCP, rather than completing a permit, FWS has not issued a final

decision. Therefore, because there is no finality associated with an application of an ITP, let alone an application, the lower court's decision should be reversed.

When a regulatory takings is in question, the "takings" is not ripe for a claim until an agency has issued a final decision in regards to the property owner's application of the regulations. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985). In Hamilton Bank, land owners attempted to develop a tract of land into residential homes. However, various zoning laws and regulations prohibited such development, so plaintiffs filed a claim against defendant for an uncompensated regulatory takings. Id. at 172. However, the Court held that because there were variances that plaintiff could apply for in order to develop the land, plaintiff had not extinguished all of his rights. Id. at 188. The Court ruled that this was not a ripe claim until such an application for variances had been completed, as application for such variances may have alleviated the prohibition on development. Id. Thus, the claim was not ripe. Id.

Because Lear has not completed any steps in the ITP application process, a final decision has not been issued by the FWS, so the takings claim is not ripe. Lear was notified by a government agency, the FWS, that any development on her property would constitute a "take" of the Blue Karner Butterfly unless she filed for and received an ITP, accompanied with a HCP and environmental assessment. This permit serves a similar purpose as the zoning variance in Hamilton Bank: an agency exemption in which development of the land would be permitted. However, Lear chose not to pursue this option and therefore the FWS could not issue a final decision in regards to the ITP. Therefore, because Lear did not exhaust all administrative remedies set forth by the FWS, a takings has not yet occurred. A takings has not yet occurred

because, applying the Court's ruling in Hamilton Bank, the government has alternative remedies to permit the use of Lear's land that have yet to be pursued.

A regulatory taking does not occur until the landowner does not have any other ways in which to access his property. Therefore, any remedies available through the agency must be exhausted and pursued by the landowner. In this case, this would require Lear to apply for, and receive, a final decision on an ITP. Lear has not received a final decision denying access to her property because she has not even began the application process. Consequently, this court should reverse the lower court's decision as this claim lacks the requisite ripeness. Furthermore, by seeking a takings claim, Lear attempts to get a "second bite" at the apple. Lear has not sought her first bite at the apple: an application for an ITP. As discussed above, this permit is a requisite for any takings claim. Through this suit, Lear seeks her second bite while she has not even attempted the first bite. If Lear is not required to apply for the permit, she essentially bypasses the procedures set forth by Congress and precedent, and which have been required of individuals in the past. This allows future property owners to circumvent the requirements that Congress intentionally created and enacted to help with the fulfillment of the ESA. This Court, in adhering to this congressional intent, should hold that the claims lack ripeness until the requisite "first bite" has been taken.

B. No Applicable Exceptions Prevent Lear from Applying for an ITP.

Because any type of exception that would make Lear's claim ripe is not applicable until Lear has applied for an ITP, the takings claim lacks ripeness. Appellant argues that the cost associated with the preparation of an ITP and HCP greatly exceeds the fair market value of the property. Furthermore, Lear asserts that the application itself is futile because of the requirements the FWS advised appellant to follow. However, as discussed above, because no

application has been completed, there can be no determination as to the cost or futility of the permit. For the aforementioned reasons, the claim lacks ripeness.

The cost of applying for a permit is simply an estimate until an agency has issued a final decision and asserted its discretion to either assist or not assist in the process. Morris v United States, 392 F.3d 1372, 1377-78 (2004). Procedural requirements can be waived based on a claim of futility if the first application was rejected in a way in that indicates the project will not be approved, despite future applications. Howard W. Heck, and Associates, Inc. v. U.S., 134 F.3d 1468, 1472 (1998). Because the FWS has not had an opportunity to exercise its discretion in assistance with the ITP process, the true cost of the application is unclear and does not preclude the need for an application before a takings claim can be made. Without a final agency decision, it is impossible to determine if the FWS has committed a "take" of Lear's property. The lower court improperly administered this Court's decision in Palazzolo, finding that applying for the ITP permit would be a futile act because the FWS advised Lear to include areas in the Habitat Conservation Plan (HCP) that would be impossible for Lear to access. In fact, the correct application of Palazzolo is that a takings claim is ripe when an agency's discretion is used in a way to make clear the affect the regulation will have on the property – which FWS absolutely administered and explained. Palazzolo v Rhode Island, 533 U.S. 606, 620-21 (2001). Lear cannot preclude application for an ITP on the grounds of futility or cost until a final decision has been handed down from the FWS.

IV. Whether the Relevant Parcel for Takings Analysis is the Entirety of Lear Island, or Merely the Cordelia Lot as Subdivided in 1965.

The relevant parcel of land for analysis of a takings claim is the entirety of Lear Island. While the Court has not given a decisive rule on parcels as a whole versus individual lots when horizontally divided, the lower courts have given several factors to consider when making such a

decision in a takings analysis. Ciampitti v. U.S., 22 Cl. Ct. 310 (1991). Contrary to the Appellees contentions, Loveladies Harbor actually stands for the idea that the relevant parcel for a takings analysis is the entirety of Lear Island due to the timing of the regulation and subdivision of the island, not that a subdivision of the parcel was contemplated by the Court. Loveladies Harbor, Inc. v U.S., 28 F.3d 1171 (Fed. Cir. 1994). Last, the need for uncongested court systems and effective government agencies require the consideration of parcels as a whole, not its subdivided lots, in takings analyses.

A. The Whole Parcel Has Been Considered One Tract for Over 100 Years.

When King Lear divided his property into three lots, he did so horizontally. The United States Supreme Court has yet to speak on the issue of horizontal severance in takings claims and the Federal Courts and lower courts have applied inconsistent rules to such divisions. ARTICLE: A NEW TIME FOR DENOMINATORS: TOWARD A DYNAMIC THEORY OF PROPERTY IN THE REGULATORY TAKINGS RELEVANT PARCEL ANALYSIS, 34 Envtl. L. 175. While Lear is entitled to equitable apportionment for resale reasons, equitable apportionment cannot be considered with regard to mitigating damages to the very titleholder who divided the lands.

Therefore, this issue should be decided by applying current lower court cases as well as relevant factors. In this case, the lower court's decision should be reversed and the entire lot be considered in a takings analysis. Several factors, including the length of time the property was considered "whole," as well as the date of Lear's acquisition of her ten-acre parcel, all point to the fact that the island should be considered as a whole, rather than subdivided, in a takings analysis. Moreover, when King Lear divided the property into three lots in 1965, the Brittain Town Planning Board did approve both the subdivision and future development of the lots (pending conformity with zoning requirements). However, Lear, upon receiving rights to her lot,

did not have a right to develop because the ESA regulation protecting the Karner Blue Butterfly was already in place.

In Ciampitti v. U.S., the court listed several factors that should be considered when determining the relevant parcel. 22 Cl. Ct. 310, 318 (1991). These factors include: "degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit. . . and no doubt many others". Id. In analyzing these factors in accordance with the facts of the case, it is clear that the parcel should be considered as a whole. The Goneril Lot, which contains a homestead and is the largest lot, comprising more than fifty percent (50%) of the Island, is contiguous to the Lear lot. The fact that the other lot is not contiguous does not hold as much weight considering the size of the Goneril lot. Furthermore, the lot has been considered a single unit since 1803, when deeded to the Lear family, up until subdivided by King James Lear in 1965. Moreover, the lot has been considered a single unit since its title conveyance in 1803 to the Lear Family, up until its subdivision by King James Lear in 1965. Over this span of more than one hundred years, the island was considered a whole parcel, despite what would become designated as the 'Cordelia Lot' being left "open" and unimproved, unlike the wooded lots adjacent to the lot. Even after the property was subdivided, the subdivision served no practical purpose or delineation, as King James Lear retained sole possession of the property up until his death in 2005. Lear only possessed the property, that was otherwise one large tract of land, for seven years when she decided to develop the land. Appellee possessed the purportedly subdivided lots in whole, and exclusively, for seven (7) years before seeking to develop any portion of the lands. These factors, including degree of contiguity, the dates of acquisition, and the extent to which the parcel has been treated as a single unit, point to the fact that the island should be regarded to as one piece, rather than subdivided, in a takings analysis.

Moreover, the court in Loveladies did not permit previously sold lands to be included in the takings analysis. Loveladies 28 F.3d 1171 (Fed. Cir. 1994). This holding is clearly distinguishable from the case at hand. In the case at hand, property has not been sold and has been in the Lear family since it was originally deeded in 1803. King James Lear subdivided and deeded the property to his daughters, who inherited the rights upon his death in 2005. Again, Loveladies prohibits an entire parcel analysis when the land was sold. Because Lear received the lot as a gift through inheritance and not through the sale it, it cannot be held that that the other lots are exempt from inclusion in a takings analysis as it was held in Loveladies. Therefore, Loveladies and the court's decision to exclude previously *sold* lands, does not apply to the case at hand as the facts are not synonymous.

While no bright line rule has been clearly followed with regard to whole parcel or divided parcel considerations, this jurisdictional split allows this court to look to the tenants of the law which do present an established framework to apply. In this case, the lots have only recently been divided and the rights to those lots were required even more recently. The island remained one parcel for over 100 years before the sisters individually acquired property rights on their respective lots. First, the Cornelius Lear acquired the property in 1803 via an Act of Congress. Descendants of Cornelius Lear have continued to possess the island since then, with King James Lear owning the entire island in 1965. The island was later divided into three lots for each of King James Lears' daughters. The daughters did acquire rights to their lots until their father's death in 2005. Furthermore, while the island was still one large parcel, the ESA enacted the regulation on the Blue Karner Butterfly. Therefore, while Lear inherited the Cordelia lot in 2005, she did not inherit any rights to develop, as that right disappeared in 1992, thirteen years earlier. Because of the the aforementioned reasons, including the length of time the lots have

been divided as well as the amount of time Lear has had rights to the lot, this Court should reverse the lower court's decision and analyze the island as a whole in a takings claim.

B. The Courts and Government Should Not Be Overwhelmed with the Deceptive Division of Land in Attempts to Gain Governmental Compensation

This case present an issue of public policy that this Court can help positively shape to ensure the effectiveness of the courts. If this Court were to analyze only the Cordelia Lot in the takings claim, it would effectively open the floodgates to fraudulent subdivision of property for the purpose of compensation from the government and evasion of ESA regulations. If this Court affirms the lower court's decision, landowners, faced with a regulation limiting land use such as Lear, would have a loop hole to get compensation from the government, even if the parcel being regulated was a one acre in a 100 acre lot. The landowner would simply divide his property in to two parcels: a ninety-nine acre lot and a one acre lot. From there, he could sue the government for a taking of his one acre. The government and courts should not be weighed down with these frivolous attempts to seek compensation from the government. Instead, this Court should uphold the integrity of all courts, by reversing the lower courts decision, requiring future courts to consider an entire parcel of land in a takings analysis. Takings help compensate for total deprivation.

The above situation and possible floodgate scenario would minimize that purpose by allowing individuals to "cut off" parts of their land that would be subject to a takings while still preserving the rest of the property. The overarching public policy presented through this case should be in favor of allowing takings for the public good when a total deprivation has occurred, and that type of deprivation has simply not occurred in this instance.

While the lower court suggests there is no evidence that the property was divided by King James Lear for such purposes discussed above, it should be noted that of the three lots, the

lot with an environmental regulation placed on it is only ten acres, opposed to the two other lots that contain 400+ acres each. This is the exact reason this Court should reverse the lower court's decision: to prevent the division of land in attempts to evade conforming with ESA regulations and attempts to seek compensation through the court systems.

Although this issue of horizontally subdivided parcels is an untouched topic in The Supreme Court, the lower courts have provided some assistance in the matter. By using the framework supplied by Ciampitti and Loveladies, it is clear that the island should be considered as a whole, due to the extremely limited time (seven years, in comparison of the over 100 years the island was one parcel) the Cordelia Lot was possessed before development was sought. Additionally, the lot was regulated prior to Lear possessing any rights to the development. In order to thwart any attempts of individuals to subdivide their lands for the purpose of seeking possible undue compensation from the government and evade ESA regulations this court should reverse the lower court's decision and consider the island as a whole.

V. Whether The Cordelia Lot Has Been Deprived of All Economic, Despite the Apparent Value When Permissible Development Can Resume in Ten Years.

"The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" under the Fifth and Fourteenth Amendment prohibitions against uncompensated government takings. See Mahon, 260 U.S. at 415. In finding the line that separates "not too far" from "too far", the Supreme Court has stated that property owners should expect occasional restrictions on use imposed by the State in "legitimate exercise of its police power." See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) (holding that background principles of nuisance and property law must be considered in determining whether a categorical or "per se" regulatory permanently and unconditionally deprives the owner of all economically beneficial use). Id. The trial court erred

in assessing that Ms. Lear's property has been deprived of all economic value because she will not have the right to develop the property for ten years. Implicit in the trial court's finding are three assumptions: the first is that Ms. Lear acquired the right to develop the property when her title vested in 2005; the second is that the property has no other current economically valuable use; and the third is that a future right in ten years has no economic value today. FWS submits that all three of the lower court's assumptions are flawed as contrary to law and asks the Appellate Court to find for FWS.

A. Ms. Lear Did Not Acquire The Right To Develop The Property When Her Title Vested In 2005.

A regulation that deprives any property of "all economically valuable or productive use" is a categorical, or per se, taking. Lucas, 505 U.S. at 1015. Such a taking is the equivalent of permanent physical occupations of property and appropriately entitles the owner to just compensation. Id. However, an owner is not entitled to compensation when a regulation prohibits use that a "background principles of the state's law of property and nuisance" had previously prohibited. Id. at 1029. The doctrine of laches is one such background principle. See Conti v. Bd. of Civil Service Comm'rs, 461 P.2d 617, 622-23 (Cal. 1969). In that case, the California Supreme Court said:

> The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay. "If because of his delay in seeking his remedy, without offering a satisfactory explanation for the delay, a prejudice results to his adversary, he will be precluded from enforcing his demand. It is not so much a question of the lapse of time as it is to determine whether prejudice has resulted."

Acquisition of title subsequent to the effective date of a regulation does not bar a takings claim. Palazzolo v. Rhode Island, 533 U.S. 606, 611 (2001). Instead, the court held that takings claims other than per se takings are to be evaluated using the factors identified in Penn Central v New York City. Id.; Penn Central v. New York City, 438 U.S. 104, 128 (1978).

Ms. Lear did not acquire the right to develop the Heath in 2005 when her father died. It was only then that each of his daughters became the owners of their respective parcels in fee simple absolute and acquired the rights that their father had retained through his life estate that terminated when he died. Therefore, the threshold determination the lower court should have pursued is whether the right to develop the Heath was one of the rights that Mr. Lear held when he died. If not, Ms. Lear could not acquire the right from him.

In 1965, the Brittain Town Planning Board reserved for itself the ability to impose future zoning restrictions that were not in place at the time this determination was made. Although the Board did not speak to the possibility of any other state or federal limitations, under the Supremacy Clause, the Board cannot allow any conduct that a federal law specifically prohibits. That federal law in this case is the ESA. The ESA applies to all United States lands and navigable waters that provide a critical habitat for endangered and threatened species. Once a critical habitat is identified, the Board has no power to grant permission to develop any part of the property that the ESA restricts from development.

In 1992, the Karner Blue Butterfly population was listed as an endangered species under the ESA. 57 Fed. Reg. 59,236 (Dec. 14, 1992). FWS designated the Heath as its critical habitat that same year. It was at this point in time that the ESA regulations limited development of the Heath, and FWS gave Mr. Lear permission to continue to mow the Heath each October.

In 1965, Mr. Lear stopped using the island for agriculture and allowed most of the island to return to its natural state. However, he began to mow what is now the Heath that year and continued to do so until he died forty years later. Had he not mowed the Heath, the Karner Blue would not have found a hospitable habitat in the Heath. Thus, but for Mr. Lear's creation and maintenance of the habitat, the Heath would not be a critical habitat. Ms. Lear did not have the

right to develop the property while her father retained the life estate, so if she has the right, she could only have obtained it from him when he died. Beginning in 1992, he did not possess the right any longer to be able to give it to anyone else, so Ms. Lear could not obtain that right from him when he died. Thus, the government cannot take what no owner of that property could have since 1992, which is the right to develop the Heath while it remains a critical habitat for the Karner Blue Butterfly. At no time did Mr. Lear pursue permission to create an alternate habitat that would have allowed him, or his heirs, to develop the Heath. As such, he waived his right to develop the property beginning in 1992 by continuing to mow the Heath when he had no obligation to do so. He did not re-acquire the right to develop the Heath before he died in 2005. If Mr. Lear did not have the right to develop the Heath prior to his death, he could not then pass any preemptive development rights to his heirs upon his death.

Given this circumstance, the doctrine of laches prohibits Ms. Lear from claiming the right to build. The essential element of this doctrine is an unreasonable delay in the assertion of a right. Effectively, at some point, the right holder has acquiesced to the restricted activity and is prevented from later claiming a taking of the right never asserted. Although Ms. Lear's conduct subsequent to her father's death does not affect the determination of whether he retained the right to build on the property, she too continued to maintain the critical habitat by mowing the Heath. Neither had any legal obligation to do so. Mr. Lear waived his rights so long ago that fairness and justice demand that his heirs should be prevented from asserting a takings claim

This case can be distinguished from those of Lucas and Palazzolo in an important way. In Lucas, the property owner bought the beachfront lots before the regulations took effect for the sole purpose to develop them. He made no changes to create conditions that invited regulation, much less do anything to continue the regulation. Likewise, the claimant in Palazzolo, who

bought the property after the regulations had taken effect, did not create or change the conditions of the property in any way. Both property owners in these landmark cases also paid market value for their property. Neither inherited the lands at issue by gift or below market value.

Thus, under the doctrine of laches, Ms. Lear is prevented from asserting that her father had the right to build on the lot when he died. If he did not have the right to give her, she did not gain that right when her title vested. If she did not have the right then, she can only have the right if she subsequently re-acquired the right, which she has not given that she also maintained the conditions that invited regulation for the next seven years.

If the lot had any economic value before Mr. Lear died, it continues to have economic value today because Ms. Lear continues to have the same rights now that he had then. To argue then that the lot has no current economic value then requires Ms. Lear to argue that the lot had no value prior to Mr. Lear's death, which is not supported by any finding of fact.

B. The Lot Has Other Currently Economically Beneficial Values Beyond The Right To Build A Home.

Upon taking title to property, an owner assumes a bundle of right relative to the rights of his successor. These rights can be given and taken away through regulation. Some of the rights affect the economically valuable uses of the property, while others do not. The issue is then whether the rights Ms. Lear currently enjoys provide her with any economically beneficial or productive use of the property, no matter how small the benefit or use may be. It is only if she retains no economically valuable or productive rights that the trial court ruling can be upheld.

Regulations that affect the economic value and productive uses of property can go into effect before or after title vests in the owner. When the regulation affecting a right was in place prior to the owner gaining title, no use right has been taken after the owner acquires title since a right cannot be taken that was not previously held, although such a circumstance does not

preclude a taking claim. See Palazzolo, 533 U.S. at 611. An owner who loses the most profitable use of her property through regulation, even after acquiring title, is not necessarily entitled to compensation. See United States v. Cent. Eureka Mining Co., 357 U.S. 155, 156 (1958). Additionally, a reduction in market value does not reflect on whether the property has any remaining economically valuable or productive uses. Palazzolo, 533 U.S. at 616.

The rights that determine economic value depend on the nature of the property. The right to develop is the primary economically valuable right for commercial property, so government interference with that right is more likely to be a categorical taking. See Lucas, 505 U.S. at 1030. However, non-commercial property owners enjoy and benefit from other economically valuable and productive use rights than commercial properties, such as. the rights to exclude, quietly enjoy, and transfer property. The right to exclude may be the most fundamental of all rights. See Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

In this case, Ms. Lear owns non-commercial property. As such, she cannot claim that the right to develop is the only right that provides any economically valuable or productive use of her property. Instead, she retains all other rights that belong to an owner of fee simple non-commercial property, specifically the rights to exclude, quietly enjoy, and transfer. Importantly, she additionally retains the right to stop mowing the property whenever she wants. The single right she does not currently have, the right to develop, is a right limited only by time, as will be addressed later in this brief. Thus, the rights that Ms. Lear retains support a finding that the Cordelia lot has not been deprived of all economical value.

Additionally, Ms. Lear is in exactly the same rights position as she was for the seven years that she did not pursue building on the property. During that time, she did not claim and does not now claim that she had no economically beneficial use throughout that period. Thus,

FWS believes the regulations do not go so far as to deprive the Cordelia Lot of all economic value since Ms. Lear continues to hold the same economically valuable rights and productive uses that she has held since 2005.

C. The Restrictions on the Lot are Temporary, Even Though it will be Ten Years Before the Lot can be Developed.

Ms. Lear cannot develop at this time but it is within her control to develop the property in the future since the regulation is temporary. A regulation can be temporary by design or it can be of indefinite duration initially but subject to some set of changed conditions that have the effect of making it temporary. Courts have not defined a period below which takings are temporary and above which they are permanent but will look for the "finite start and end" of the interference. See Wyatt v. United States, 271 F.3d 1090, 1097 (Fed. Cir. 2001). The Supreme Court has addressed whether a temporary taking entitles a property owner to compensation and determined that the answer is "neither 'yes, always' nor 'no, never'; the answer depends upon the particular circumstances." Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321 (2005) (holding that a thirty-two building moratorium did not entitle the affected landowners to compensation because the period of time was reasonable for the Agency to engage in informed decision making that would benefit all property owners). The Tahoe-Sierra court identified three factors of "particular significance" to determine whether a taking has occurred and whether it entitles the owner to compensation. Id.; see also Penn Central v. New York City, 438 U.S. 104, 128 (1978). The factors in this analysis are: (1) an assessment of the economic impact; together with (2) the degree of interference with investment-backed expectations; and (3) the "character" of the government action. Id.

The economic impact compares the value of the property with and without the burden of regulation. Penn Central, 438 U.S. at 131. Even a diminution of seventy-five (75%) percent or

more has not been sufficient to find a taking. See Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926). As it applies to Cordelia Lot, the market value of the property subject to the restrictions is not known, but precedent indicates that the property would have to be essentially worthless in order for this factor to weigh toward a taking. Thus, because Ms. Lear's property is not worthless and is unlikely to ever be worthless, no taking has occurred.

The degree of interference with investment-backed expectations considers what "fairness requires in a given case." See Palazzolo, 533 U.S. at 635. Two specific circumstances should be considered. The first is the regulatory environment in place at the time the owner acquired the burdened property, and the second is the personal financial investment of the claimant, although the lack of such investment will not preclude a takings claim. Id. at 633, 634. In this case, Ms. Lear knew for many years that the Heath had been designated as critical habitat for the Karner Blue through the ESA. This knowledge weighs against a taking since she cannot claim that she did not know the property was subject the ESA regulations, nor can she claim that the regulations were imposed following acquisition of her title in the land. Next, Ms. Lear did not make a personal financial investment to acquire her interest in the property since she received it from her father; however, the Palazzolo court specifically expressed that lack of investment will not preclude a claim, which means this circumstance neither prevents nor supports the claim. Weighing the two circumstances, her knowledge of the regulatory environment works against a takings claim, and her lack of personal investment neither works for or against a taking. Thus, overall, her investment-backed expectations weigh against a taking claim.

Finally, the character of the government action considers the underlying nature of the government interference. See Penn Central, 438 U.S. at 130. When the action involves a physical invasion, a taking is more likely to be found than when the interference arises from a

regulation "adjusting the benefits and burdens of economic life to promote the common good." Id. at 124. Here, the character of the government action and public policy of the ESA does not support Ms. Lear's taking claim. First, the government interference is regulatory and does not involve any physical interference with any part of the property. Next, the purpose of the ESA is to protect and recover endangered and threatened species in part by protecting the critical habitat upon which they depend. 16 U.S.C. § 1531(b) (1973). The Supreme Court looked to the ESA's statutory purpose to hold that a nearly completed dam could not be completed in order to protect a small, endangered fish, the darter. See Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978). Looking at legislative history, the court found that Congress enacted the legislation to protect endangered and species no matter the cost. Id. at 174. Additionally, protection of listed species was to be given the highest of priorities because their value was "incalculable." Id. Applying these three factors, each weighs against a taking. Thus, even though this "temporary" taking may last as long as ten years, the ESA regulations have not gone too far given the facts and circumstances of this case.

It is also possible that Ms. Lear may not have to wait ten years. Two possibilities are that the Karner Blue could be delisted or that one day no members remain on the property. Another possibility is that Ms. Lear could develop a replacement habitat. FWS gave her permission to do so on the adjacent lot owned by her sister, Goneril. Although Cordelia and Goneril do not get along at this point, their relationship could change so that Goneril allows Cordelia to move the habitat. Goneril could also sell her lot at any point. The next owner may be willing to enter into an agreement with Ms. Lear to move the habitat. FWS does not argue that any of these possibilities are certain enough to allow assignment of economic value to the property and offers these possibilities only to demonstrate that the regulations are far from unconditional and

permanent, which the Lucas court found to be the essential elements of a taking that entitles the owner to just compensation.

As a separate matter, while FWS would like for Ms. Lear to continue to maintain the critical habitat, she is under no obligation to do so. If Ms. Lear continues to mow the property, she does so voluntarily and effectively waives her right to build on the property in ten years. Under no legal theory can Ms. Lear claim just compensation for taking what she forfeited.

VI. Whether the Cordelia Lot Maintains Economic Value, Especially As Brittain County Butterfly Society Will Pay $1,000 per Year in Rental Income for Access.

Ms. Lear is able to realize economic valuable and productive use of the Heath by requesting a reappraisal of her property and taking advantage of the offer from the Brittain county Butterfly Society to generate income on her property. Relying on Lucas, the trial court established the relationship between income and property taxes as the determinant of economic value. Trial Court Order, Conclusions of Law, p.11. The court thereby acknowledges that any real property that generates more income than it incurs in property taxes has economic value. Thus, a decrease in property taxes or an increase in income such that the income exceeds the property taxes will then have economic value by this standard.

The lot has economic value because Ms. Lear can mitigate the financial effect of the regulations. First, Ms. Lear should approach Brittain County to have her property reassessed.. The current $100,000 assessed value, which is the basis of the $1,500 property tax liability, assumes that the owner can build a single-family home on the property. Trial Court Order, Finding of Fact 18, p. 7. Since the regulations prevent Ms. Lear from building a residence at this time, this assessed value is not correct. The trial court found that no market exists for such a property, and this finding supports a lower current valuation. If the newly assessed value leads to a tax liability less than $1,000, the property will have economic value applying the trial court's

definition. If Ms. Lear chooses not to approach the county to reassess the property, FWS believes that this court should hold that she has waived her claim on this specific issue since Ms. Lear can easily mitigate the financial consequence of regulation.

Second, Ms. Lear can also seek other opportunities to generate income on her property, although its income generating potential is limited given its non-commercial nature, not the ESA restrictions. Thus, she cannot claim that the ESA regulations have taken something away she did not have given the property's nature. One possibility is for Ms. Lear to host events on the property. Additionally, Ms. Lear could get a permit to modify the wetlands for water-related use. If Ms. Lear chooses not to pursue any of these opportunities to mitigate harm, her failure to do so should be viewed as a waiver of this claim that the lot has been deprived of all economic value due to the $1,000 that the Brittain County Butterfly Society was willing to pay her.

VII. Whether the ESA and the Brittain County Wetlands Preservation Law Should Be Considered Separately in Evaluating Deprivation of Economic Value.

As discussed *inter alia*, it is only when a regulation takes away all economically valuable use of the property that the owner is entitled to compensation for a categorical taking. Lucas, 505 U.S. at 1015. The property has not been deprived of all economic value as long as it retains any economically valuable or productive use. Id. An indivisible injury is one where the harm cannot be apportioned with reasonable certainty to individual actors. See Velsicol Chem. Corp. v. Rowe, 543 S.W.2d 337 (Tenn. 1976) (finding joint and several liability for noxious fumes from the concurrent emissions of unrelated chemical plants because it was unfair to expect plaintiff to determine which fumes came from which emitter). Id. at 343. Concurrent but independent acts that effectively create an indivisible injury can then create joint and liability for any and all of the defendants when the case involves negligence or nuisance. Id. at 343.

FWS and Brittain County are not jointly and severally liable to Ms. Lear. First, the ESA and WPL together have not deprived Ms. Lear's lot of all economic value. They are independent statutes with different conservation purposes and methods. The focus of the ESA is to protect endangered species, and it does so by protecting critical habitat. The WPL, by contrast, is designed to protect wetlands, and it does so by limiting the availability to fill in wetlands. In this case, both statutes have acted in concert but only to prevent Ms. Lear from building on any part of her ten acres at this time. They do not otherwise act together to prevent any other uses of any part of her entire property. The WPL specifically allows Ms. Lear to modify the one-acre wetland for a water-dependent use. While that use may not be important to Ms. Lear at this time, it cannot be ignored for purposes of determining whether her lot has been deprived of all economic value. As argued earlier, the nine acres of the Heath also have economic value even without the current ability to modify that portion of the property.

Next, Ms. Lear's only injury is the inability to build on her property, and that injury is divisible since it can be apportioned with reasonable certainty. The ESA applies only to the nine acres of the Heath, and the WPL applies only to the one-acre wetland. Thus, 90% of the limitation is due to federal regulation, and the other 10% is due to state regulation. Neither overlaps with the other. As such, the impact of each statute on Ms. Lear's property can be quite accurately assessed. Again, this situation differs from Velsicol, where the injury could not be apportioned with reasonable certainty because it could not be reasonably determined which company had contributed what amount of noxious emissions.

The trial court relied on Velsicol in its finding joint and several liability. Finally, the holding in Velsicol came from the Tennessee Supreme Court and is not binding on the Twelfth Circuit Appellate Court. Thus, it does not have to be followed if the court recognizes that

Velsicol does not provide the proper analogy since this particular issue does not involve either negligence or nuisance.

CONCLUSION

In order to further the stated purpose of the Endangered Species Act to "protect and recover imperiled species and the ecosystems upon which they depend," this court should uphold the lower court's determination that FWS was correct to intervene in the proposed development plans of Appellee. 16 U.S.C. § 1531(b). FWS' actions will save the Karner Blue and its habitat upon the Cordelia Lot; both are entirely permissible within the powers so delegated to them by Congress.

Dated: November 28, 2016

Respectfully submitted,

Council for Respondent,
The United States Fish and Wildlife Service

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2016, I electronically filed the foregoing Federal Appellees' Answering Brief with the Clerk of Court for the United Stets Court of Appeals for the Twelfth Circuit by using the Court's CM/ECF system. I further certify that all parties are represented by counsel registered with the CM/ECF system, so that service will be accomplished by the CM/ECF system.

/s/
Attorney for United States
Fish and Wildlife Service

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 28 AND 32

I certify that, pursuant to Fed. R. App. P. 28 and 32, the foregoing Brief for the Federal Appellees is proportionately spaced, has a typeface of 12 points or more, and meets the minimum margin requirements. This principal brief is submitted in accordance with Federal Rule 32(a)(7)(B)(i), and is 11,343 words.

/s/
Attorney for United States
Fish and Wildlife Service

ADDENDUM:

EXCERPTS FROM THE ENDANGERED SPECIES ACT

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16 USCS § 1531

Current through PL 114-244, approved 10/14/16

United States Code Service - Titles 1 through 54 **>** ***TITLE 16. CONSERVATION*** **>** ***CHAPTER 35. ENDANGERED SPECIES***

§ 1531. Congressional findings and declaration of purposes and policy

(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;

(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.

History

(Dec. 28, 1973,*P.L. 93-205*, § ***2***, *87 Stat. 884*; Dec. 28, 1979, *P.L. 96-159*, § 1, *93 Stat. 1225*; Oct. 13, 1982, *P.L. 97-304*, § 9(a), *96 Stat. 1426*; Oct. 7, 1988, *P.L. 100-478*, Title I, § 1013(a), *102 Stat. 2315*.)

Annotations

Notes

References in text:

"This Act", referred to in this ***section***, is Act Dec. 28, 1973, *P.L. 93-205*, *87 Stat. 884*, which appears generally as ***16 USCS §§ 1531*** et seq. For full classification of this Act, consult USCS Tables volumes.

Effective date of *section*:

Act Dec. 28, 1973, *P.L. 93-205*, § 16, *87 Stat. 903*, provided: "This Act [***16 USCS §§ 1531*** et seq., generally; for full classification of this Act, consult USCS Tables volumes] shall take effect on the date of its enactment [enacted Dec. 28, 1973].".

Amendments:

1979 . Act Dec. 28, 1979, in subsec. (a)(5), substituted "fish, wildlife, and plants" for "fish and wildlife".

1982 . Act Oct. 13, 1982, in subsec. (c), designated existing provisions as para. (1), and added para. (***2***).

1988 . Act Oct. 7, 1988, in subsec. (a)(4)(G), substituted "; and" for the period.

16 USCS § 1532

Current through PL 114-244, approved 10/14/16

United States Code Service - Titles 1 through 54 **>** ***TITLE 16. CONSERVATION*** **>** ***CHAPTER 35. ENDANGERED SPECIES***

§ 1532. Definitions

For the purposes of this Act--

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

(e) 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 exhibition of commodities by museums or similar cultural or historical organizations.

(f) 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.

(g) 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.

(h) (A) The term "critical habitat" for a threatened or endangered species means--

(6) 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 [*15 USCS § 1533*], 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

(B) 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 [*15 USCS § 1533*], 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.

(i) 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.

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

(k) 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.

(l) The term "foreign commerce" includes, among other things, any transaction--

(D) between persons within one foreign country;

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

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

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

(3) 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]

(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 [*16 USCS § 1536*], any person whose application to such agency for a permit or license has been denied primarily because of the application of ***section*** 7(a) [*16 USCS § 1536(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 [*5 USCS § 903* note]; 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.

History

(Dec. 28, 1973, *P.L. 93-205*, § ***3***, *87 Stat. 885*; July 12, 1976, *P.L. 94-359*, § 5, *90 Stat. 913*; Nov. 10, 1978, *P.L. 95-632*, § 2, *92 Stat. 3751*; Dec. 28, 1979, *P.L. 96-159*, § 2, *93 Stat. 1225*; Oct. 13, 1982, *P.L. 97-304*, § 4(b), *96 Stat. 1420*; Oct. 7, 1988, *P.L. 100-478*, Title I, § 1001, *102 Stat. 2306*.)

Annotations

Notes

References in text:

"This Act", referred to in this ***section***, is Act Dec. 28, 1973, *P.L. 93-205*, *87 Stat. 884*, which appears generally as *16 USCS §§ 1531* et seq. For full classification of this Act, consult USCS Tables volumes.

"The customs laws of the United States", referred to in this ***section***, appear generally as *19 USCS §§ 1* et seq.

Effective date of *section*:

This ***section*** is effective on the date of its enactment on Dec. 28, 1973, as provided by Act Dec. 28, 1973, *P.L. 93-205*, § 16, *87 Stat. 903*, which appears as *16 USCS § 1531* note.

Amendments:

1976 . Act July 12, 1976, in para. (1), inserted ": *Provided, however,* That it does not include exhibition of commodities by museums or similar cultural or historical organizations.".

1978 . Act Nov. 10, 1978, redesignated paras. (1) to (***3***) as paras. (2) to (4), respectively, and added new para. (1), redesignated para. (4) as para. (6), and paras. (5) to (7) as paras. (8) to (10), respectively, and added new paras. (5) and (7), redesignated paras. (8) to (16) as paras. (13) to (21), respectively, and added new paras. (11) and (12), and substituted paras. (16) and (18) for paras. (16) and (18), as so redesignated, which read:

"(16) The term 'species' includes any subspecies of fish or wildlife or plants and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature.

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

1979 . Act Dec. 28, 1979, in para. (11), substituted "violate ***section*** 7(a)(2)." for "(A) jeopardize the continued existence of an endangered or threatened species, or (B) result in the adverse modification or destruction of a critical habitat.".

1982 . Act Oct. 13, 1982, deleted para. (11), which read: "The term 'irresolvable conflict' means, with respect to any action authorized, funded, or carried out by a Federal agency, a set of circumstances under which, after consultation as required in ***section*** 7(a) of this Act, completion of such action would violate ***section*** 7(a)(2).".

1988 . Act Oct. 7, 1988 substituted para. (13) for one which read: "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 or political subdivision thereof, or of any foreign government."; and, in para. (15), inserted "also".

16 USCS § 1533

Current through PL 114-244, approved 10/14/16

United States Code Service - Titles 1 through 54 **>** ***TITLE 16. CONSERVATION*** **>** ***CHAPTER 35. ENDANGERED SPECIES***

§ 1533. Determination of endangered species and threatened species

(m) Generally.

(7) 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:

(C) 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.

(8) 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 [*5 USCS § 903* note]--

(F) in any case in which the Secretary of Commerce determines that such species should--

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

(4) 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***;

(11) in any case in which the Secretary of Commerce determines that such species should--

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

(13) 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

(14) 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.

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

(15)

(16) 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

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

(18)

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

(20) Nothing in this paragraph affects the requirement to consult under ***section*** 7(a)(2) [*16 USCS § 1536(a)(2)*] with respect to an agency action (as that term is defined in that ***section***).

(21) Nothing in this paragraph affects the obligation of the Department of Defense to comply with ***section*** 9 [*16 USCS § 1538*], including the prohibition preventing extinction and taking of endangered species and threatened species.

(n) 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, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data 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 [*5 USCS § 553(e)*], 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 [(7)] 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 [*5 USCS § 553(e)*], 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 [*5 USCS § 553*] (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;

(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 [*5 USCS § 553*], 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 or 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.

(o) 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 each 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 subsections (a) and (b).

(p) 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) [*16 USCS § 1538(a)(1)*], in the case of fish or wildlife, or ***section*** 9(a)(2) [*16 USCS § 1538(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 [*16 USCS § 1535(c)*] only to the extent that such regulations have also been adopted by such State.

(q) 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 though it is not listed pursuant to ***section 4*** of this Act [this ***section***] 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.

(r) Recovery plans.

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

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

(B) incorporate in each plan--

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

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

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

(2) The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act [5 USCS Appx.].

(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***).

(s) 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 [(7)] of subsection (b) of this ***section*** to prevent a significant risk to the well being of any such recovered species.

(t) Agency guidelines; publication in Federal Register; scope; proposals and amendments: notice and opportunity for comments. 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;

(3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of this ***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.

(u) Submission to State agency of justification for regulations inconsistent with State agency's comments or petition. 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.

History

(Dec. 28, 1973, *P.L. 93-205*, § ***4***, *87 Stat. 886*; July 12, 1976, *P.L. 94-359*, § 1, *90 Stat. 911*; Nov. 10, 1978, *P.L. 95-632*, §§ 11, 13, *92 Stat. 3764*, 3766; Dec. 28, 1979, *P.L. 96-159*, § 3, *93 Stat. 1225*; Oct. 13, 1982, *P.L. 97-304*, § 2(a), *96 Stat. 1411*; Oct. 7, 1988, *P.L. 100-478*, Title I, §§ 1002-1004, *102 Stat. 2306*, 2307; Nov. 24, 2003, *P.L. 108-136*, Div A, Title III, Subtitle B, § 318, *117 Stat. 1433*.)

16 USCS § 1536

Current through PL 114-244, approved 10/14/16

United States Code Service - Titles 1 through 54 **>** ***TITLE 16. CONSERVATION*** **>** ***CHAPTER 35. ENDANGERED SPECIES***

§ 1536. Interagency cooperation

(v) Federal agency actions and consultations.

(10) 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 [*16 USCS § 1533*].

(11) 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.

(12) 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.

(13) 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 [*16 USCS § 1533*] 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).

(w) Opinion of Secretary.

(D) (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)--

(C) 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--

(D) the reasons why a longer period is required,

(E) the information that is required to complete the consultation, and

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

(G) 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.

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

(F) (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.

(5) Consultation under subsection (a)(3), and an opinion issued 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 commented 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.

(G) If after consultation under subsection (a)(2), the Secretary concludes that--

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

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

(13) 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 [*16 USCS §§ 1361* et seq.]

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that--

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

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

(16) 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 [*16 USCS §§ 1361* et seq.] with regard to such taking, and

(17) 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).

(x) Biological assessment.

(18) 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 [enacted Nov. 10, 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 is 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*) [*42 USCS § 4332*].

(18) 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.

(y) 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).

(z) Endangered Species Committee.

(19) There is established a committee to be known as the Endangered Species Committee (hereinafter in this ***section*** referred to as the "Committee").

(19) The Committee shall review any application submitted to it pursuant to this ***section*** and determine in accordance with subsection (h) of this ***section*** whether or not to grant an exemption from the requirements of subsection (a)(2) of this ***section*** for the action set forth in such application.

(19) The Committee shall be composed of seven members as follows:

(20) The Secretary of Agriculture.

(21) The Secretary of the Army.

(9) The Chairman of the Council of Economic Advisors.

(C) The Administrator of the Environmental Protection Agency.

(ii) The Secretary of the Interior.

(ii) The Administrator of the National Oceanic and Atmospheric Administration.

(C) 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***.

(19) (A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(ii) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under ***section*** *5703 of title 5 of the United States Code* [*5 USCS § 5703*].

(19) (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.

(ii) The Secretary of the Interior shall be the Chairman of the Committee.

(iii) The Committee shall meet at the call of the Chairman or five of its members.

(II) All meetings and records of the Committee shall be open to the public.

(19) 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***.

(19) (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.

(II) 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 [*5 USCS § 552a* and note], 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.

(ii) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(ii) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(19) 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.

(19) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this ***section*** the Committee may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(iii) 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.

(aa) Promulgation of regulations; form and contents of exemption application. Not later than 90 days after the date of enactment of the Endangered Species Act Amendments of 1978 [enacted Nov. 10, 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--

(D) 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

(D) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this ***section***.

(bb) Application for exemption; report to Committee.

(ii) 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***.

(iii) (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.

(ii) 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.

(iv) 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--

(B) determine that the Federal agency concerned and the exemption applicant have--

(ii) 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

(B) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d); or

(C) 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 [*5 USCS §§ 701* et seq.].

(v) 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 [*5 USCS §§ 554*, *555*, *556*], and prepare the report to be submitted pursuant to paragraph (5).

(vi) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing--

(D) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(E) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(ii) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(II) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

(vii) 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.

(viii) 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***.

(ix) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(cc) Grant of exemption.

(II) 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--

(III) 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--

(IV) 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;

(II) the action is of regional or national significance; and

(II) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d); and

(C) 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 the Committee under this subsection shall be considered final agency action for purposes of chapter ***7*** of title 5 of the United States Code [*5 USCS §§ 701* et seq.].

(II) (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--

(ii) 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.

(iii) An exemption shall be permanent under subparagraph (A) unless--

(C) 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.

(dd) Review by Secretary of State; violation of international treaty or other international obligation of United States. 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.

(ee) Exemption for national security reasons. 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.

(ff) Exemption decision not considered major Federal action; environmental impact statement. 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.

(gg) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality.

(ii) If the Committee determines under subsection (h) that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(ii) 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 a 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.

(hh) Notice requirement for citizen suits not applicable. The 60-day notice requirement of ***section*** 11(g) of this Act [*16 USCS § 1540(g)*] 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***.

(ii) Judicial review. Any person, as defined by ***section*** 3(13) of this Act [*16 USCS § 1532(13)*], 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.

(jj) Exemption as providing exception on taking of endangered species. Notwithstanding ***sections*** 4(d) and 9(a)(1)(B) and (C) [*16 USCS §§ 1533(d)*, *1538(a)(1)(B)*, (C)], ***sections*** 101 and 102 of the Marine Mammal Protection Act of 1972 [*16 USCS §§ 1361* et seq.], or any regulation promulgated to implement any such ***section***--

(B) any action for which an exemption is granted under subsection (h) 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

(C) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) shall not be considered to be a prohibited taking of the species concerned.

(kk) 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 [*42 USCS § 5171* or *§ 5172*], 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.

History

(Dec. 28, 1973,*P.L. 93-205*, § **7**, *87 Stat. 892*; Nov. 10, 1978, *P.L. 95-632*, § 3, *92 Stat. 3752*; Dec. 28, 1979, *P.L. 96-159*, § 4, *93 Stat. 1226*; Oct. 13, 1982, *P.L. 97-304*, §§ 4(a), 8(b), *96 Stat. 1417*, 1426; Nov. 14, 1986, *P.L. 99-659*, Title IV, § 411(b), *100 Stat. 3741*, 3742; Nov. 23, 1988, *P.L. 100-707*, Title I, § 109(g), *102 Stat. 4709*.)

Annotations

Notes

References in text:

"This Act", referred to in this ***section***, is Act Dec. 28, 1973, *P.L. 93-205*, *87 Stat. 884*, which appears generally as *16 USCS §§ 1531* et seq. For full classification of such Act, consult USCS Tables volumes.

The "Disaster Relief Act of 1974", referred to in this ***section***, is Act May 22, 1974, *P.L. 93-288*, *88 Stat. 143*, which appears generally as *42 USCS §§ 5121* et seq. For full classification of such Act, consult USCS Tables volumes.

The "Disaster Relief and Emergency Assistance Act", also known as the Robert T. Stafford Disaster Relief and Emergency Assistance Act, referred to in this ***section***, is Act May 22, 1974, *P.L. 93-288*, *88 Stat. 143*, which appears generally as *42 USCS §§ 5121* et seq. For full classification of such Act, consult USCS Tables volumes.

Effective date of *section*:

This ***section*** became effective on enactment, as provided by Act Dec. 28, 1973, *P.L. 93-205*, § 16, *87 Stat. 903*, which appears as *16 USCS § 1531* note.

Amendments:

1978 . Act Nov. 10, 1978, substituted this ***section*** for one which read: "The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and 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 and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.".

1979 . Act Dec. 28, 1979, in subsec. (a), substituted "(a) Federal agency actions and consultations. (1)" for "(a) Consultation.", deleted "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') does not 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 the 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***." following "***section*** 4 of this Act.", and added paras. (2) and (3); in subsec. (b), substituted "subsection (a)(2)" for "subsection (a)", and "not violate subsection (a)(2) and can" for "avoid jeopardizing the continued existence of any endangered or threatened species or adversely modifying the critical habitat of such species, and which can"; in subsec. (c), designated existing provisions as para. (1), in para. (1), as so redesignated, substituted "subsection (a)(2)" for "subsection (a)", and added para. (2); in subsec. (d), substituted "subsection (a)(2)" for "subsection (a)" and "not violate subsection (a)(2)." for "avoid jeopardizing the continued existence of any endangered or threatened species or adversely modifying or destroying the critical habitat of any such species."; in subsecs. (e)(2) and (f), substituted "subsection (a)(2)" for "subsection (a)", wherever appearing; in subsec. (g), in para. (1), substituted "subsection (a)(2)" for "subsection (a)" and "would violate subsection (a)(2)" for "may jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify the critical habitat of such species", in para. (2)(A), inserted "; or, in the case of any agency action involving a permit or license applicant, not later than 90 days after the date on which the Federal agency concerned takes final agency action, for purposes of chapter *7* of title 5, United States Code, with respect to the issuance of the permit or license", in para. (3), redesignated subpara. (B) as subpara. (C), and added subpara. (B), in para. (5), substituted "subsection (a)(2)" for "subsection (a)", redesignated cls. (1) and (2) as subparas. (A) and (B), respectively, in subpara. (B), as so redesignated, inserted "the Federal agency concerned and", redesignated subcls. (A), (B), and (C) as subcls. (i), (ii), and (iii), respectively, in subcl. (i), as so redesignated, substituted "would not violate subsection (a)(2);" for "will avoid jeopardizing the continued existence of an endangered or threatened species or result in the adverse modification or destruction of a critical habitat;", substituted "Federal agency concerned or the exemption applicant has not met its respective requirements under subclause (i), (ii), or (iii) shall be considered final agency action for purposes of chapter *7* of title 5 of the United States Code." for "exemption applicant has not met the requirements of subparagraph (A), (B), or (C) shall be considered final agency action for purposes of chapter *7* of title 5 of the United States Code.", in para. (6), substituted "subclauses (i), (ii) and (iii)" for "subparagraphs (A), (B), and (C)"; and in subsec. (h), in para. (1), substituted "subsection (a)(2)" for "subsection (a)", and substituted para. (2) for one which read:

"(2)

(A) Except as provided in subparagraph (B), an exemption for an agency action granted under subsection (h) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action: *Provided,* That a biological assessment has been conducted under subsection (c).

"(B) An exemption shall not be permanent under subparagraph (A) if the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of the species. If the Secretary so finds, the Committee shall determine within 30 days after such finding whether to grant an exemption for the agency action notwithstanding the Secretary's finding.".

Such Act further, in subsec. (m), substituted "subsection (a)(2)" for "subsection (a)"; in subsec. (q), substituted "There are authorized to be appropriated to the Secretary to assist review boards and the Committee in carrying out their functions under subsections (e), (f), (g), and (h) of this ***section*** not to exceed $ 600,000 for each of fiscal years 1979, 1980, 1981, and 1982." for "There is authorized to be appropriated to the Secretary to assist review boards and the Committee in carrying out their functions under subsections (e), (f), (g), and (h) of this ***section*** not to exceed $ 600,000 for fiscal year 1979, and not to exceed $ 300,000 for the period beginning October 1, 1979, and ending March 31, 1980.".

1982 . Act Oct. 13, 1982, in subsec. (a), redesignated former para. (3) as para. (4), and added a new para. (3); substituted subsec. (b) for one which read: "Consultation under subsection (a)(2) with respect to any agency action shall be concluded within 90 days after the date on which initiated or within such other period of time as is mutually agreeable to the Federal agency and the Secretary. Promptly after the conclusion of consultation, the Secretary shall provide to the Federal agency concerned 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. The Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or the permit or license applicant in implementing the agency action."; in subsec. (c)(1), inserted ", 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"; in subsec. (e)(10), deleted a sentence which read: "Except in the case of a member designated pursuant to paragraph (3)(G) of this subsection, no member shall designate any person to serve as his or her representative unless that person is, at the time of such designation, holding a Federal office the appointment to which is subject to the advice and consent of the United States Senate." following "(10)"; in subsec. (g), in para. (1) substituted "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)." for "An application for an exemption shall be considered initially by a review board in the manner provided in this subsection, and shall be considered by the Endangered Species Committee for a final determination under subsection (h) after a report is made by the review board.", in para. (2), in subpara. (A), substituted "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." for "An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f) of this ***section***, not later than 90 days after the completion of the consultation process; or, in the case of any agency action involving a permit or license applicant, not later than 90 days after the date on which the Federal agency concerned takes final agency action, for purposes of chapter *7* of title 5, United States Code with respect to the issuance of the permit or license.", in subpara. (B), inserted "(i)", deleted "to the review board to be established under paragraph (3) and" preceding "to the Endangered Species", and inserted "; 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", deleted paras. (3) and (4) which read:

"(3)

(A) A review board shall be established for purposes of considering an application for exemption and submitting a report to the Endangered Species Committee under this subsection as follows:

"(i) One individual shall be appointed to the board by the Secretary not later than 15 days after an application is submitted pursuant to paragraph (2).

"(ii) One individual shall be appointed to the board by the President, not later than 30 days after an application is submitted pursuant to paragraph (2) and after consideration of any recommendations received pursuant to paragraph (2)(B). An individual appointed by the President under this subparagraph shall be a resident of a State, if any, in which the agency action will be, or is being, carried out.

"(iii) One administrative law judge shall be selected to serve on the board by the Civil Service Commission in the same manner as administrative law judges are selected under ***section*** *3344 of title 5 of the United States Code* to be detailed to an agency which occasionally or temporarily is insufficiently staffed with administrative law judges. The use by the review board of such an administrative law judge shall be on a reimbursable basis.

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

"(C) Members of a review board who are full-time officers or employees of the United States shall receive no additional pay on account of their service on the board. All other members shall be entitled to receive an amount not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-18 of the General Schedule for each day during which they are engaged in the actual performance of duties vested in the board. While away from their homes or regular places of business in the performance of services for a review board, members of the board 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*.

"(4) The Secretary shall submit the application to the review board immediately after its appointment under paragraph (3), and the Secretary shall submit to the review board, in writing, his views and recommendations with respect to the application within 60 days after receiving a copy of any application under paragraph (2).".

Such Act further, in subsec. (g), redesignated para. (5) as para. (3) and substituted para. (3), as so redesignated, for one which read: "It shall be the duty of a review board appointed under paragraph (3) to make a full review of the consultation carried out under subsection (a)(2), and within 60 days after its appointment or within such longer time as is mutually agreed upon between the exemption applicant and the Secretary, to make a determination, by a majority vote, (A) whether an irresolvable conflict exists and (B) whether the Federal agency concerned and such exemption applicant has--

"(i) carried out its consultation responsibilities as 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 of it by subsection (c); and

"(iii) refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

Any determination by the review board that an irresolvable conflict does not exist or that the Federal agency concerned or the exemption applicant has not met its respective requirements under subclause (i), (ii), or (iii) shall be considered final agency action for purposes of chapter 7 of title 5 of the United States Code.".

Such Act further, in subsec. (g), redesignated para. (6) as para. (4), and substituted para. (4), as so redesignated, for one which read: "If the review board determines that an irresolvable conflict exists and makes positive determinations under subclauses (i), (ii), and (iii) of paragraph (5), it shall proceed to prepare the report to be submitted under paragraph (7).", redesignated para. (7) as para. (5), in para. (5), as so redesignated, substituted: "Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing--" for "Within 180 days after making the determinations under paragraph (6), the review board shall submit to the Committee a report discussing--", in subpara. (C), substituted "; and" for a period, and added subpara. (D), redesignated para. (8) as para. (6), and deleted para. (9) which read:

"(9) In carrying out its duties under this subsection, a review board may, and any member of a review board if so authorized by the review board, may--

"(A) sit and act at such times and places, take such testimony, and receive such evidence, as the review board deems advisable;

"(B) subject to the Privacy Act of 1974, request of any Federal agency or applicant information necessary to enable it to carry out such duties, and upon such request the head of such Federal agency shall furnish such information to the review board; and

"(C) use the United States mails in the same manner and upon the same conditions as a Federal agency.".

Such Act further, in subsec. (g), redesignated para. (10) as para. (7), and substituted para. (7), as so redesignated, for one which read: "Upon request of a review board, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the review board to assist it in carrying out its duties under this ***section***.", deleted para. (11) which read: "The Administrator of the General Services Administration shall provide to a review board, on a reimbursable basis, such administrative support services as the review board may request.", redesignated para. (12) as para. (8), and in para. (8), as so redesignated, substituted "resulting from activities pursuant to this subsection" for "of review boards"; in subsec. (h)(1), in the introductory matter, substituted "30 days after receiving the report of the Secretary pursuant to subsection (g)(5)" for "90 days of receiving the report of the review board under subsection (g)(7)", in subpara. (A), substituted "Secretary, the record of the hearing held under subsection (g)(4)" for "review board", in cl. (ii), deleted "and" following "interest;" and added cl. (iv); substituted subsec. (*o*) for one which read: "Notwithstanding ***sections*** 4(d) and 9(a) of this Act or any regulations promulgated pursuant to such ***sections***, any action for which an exemption is granted under subsection (h) of this ***section*** shall not be considered a taking of any endangered or threatened species with respect to any activity which is necessary to carry out such action."; and deleted subsec. (q) which read: "There are authorized to be appropriated to the Secretary to assist review boards and the Committee in carrying out their functions under subsections (e), (f), (g), and (h) of this ***section*** not to exceed $ 600,000 for each of fiscal years 1979, 1980, 1981, and 1982. The Chairman of the Committee shall report to the Congress before the end of fiscal year 1979 with respect to the adequacy of the budget authority contained in this subsection.".

1986 . Act Nov. 14, 1986, in subsec. (b), in para. (4), in subpara. (A), deleted "and" following the concluding semicolon, in subpara. (B), inserted "and" following the concluding semicolon, added subpara. (C), in clause (ii), deleted "and" following the concluding comma, redesignated clause (iii) as clause (iv), added a new clause (iii), and in clause (iv), as redesignated, substituted "clauses (ii) and (iii)" for "clause (ii)"; and in subsec. (*o*), in the introductory matter, inserted ", ***sections*** 101 and 102 of the Marine Mammal Protection Act of 1972,", and substituted "any" for "either", and in para. (2), substituted "(b)(4)(iv)" for "(b)(4)(iii), and inserted "prohibited".

1988 . Act Nov. 23, 1988, in subsec. (p), substituted "Disaster Relief and Emergency Assistance Act" for "Disaster Relief Act of 1974" and "***section*** 405 or 406 of the Disaster Relief and Emergency Assistance Act" for "401 or 402 of the Disaster Relief Act of 1974".

16 USCS § 1538

Current through PL 114-244, approved 10/14/16

United States Code Service - Titles 1 through 54 **>** ***TITLE 16. CONSERVATION*** **>** ***CHAPTER 35. ENDANGERED SPECIES***

§ 1538. Prohibited acts

(ll) Generally.

(14) Except as provided in ***sections*** 6(g)(2) and 10 of this Act [*16 USCS §§ 1535(g)(2), 1539*], with respect to any endangered species of fish or wildlife listed pursuant to ***section*** 4 of this Act [*16 USCS § 1533*] it is unlawful for any person subject to the jurisdiction of the United States to--

(H) 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 [*16 USCS § 1533*] and promulgated by the Secretary pursuant to authority provided by this Act.

(15) Except as provided in ***sections*** 6(g)(2) and 10 of this Act [*16 USCS §§ 1535(g)(2), 1539*], with respect to any endangered species of plants listed pursuant to ***section*** 4 of this Act [*16 USCS § 1533*], it is unlawful for any person subject to the jurisdiction of the United States to--

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

(11) 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;

(12) 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;

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

(14) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to ***section*** 4 of this Act [*16 USCS § 1533*] and promulgated by the Secretary pursuant to authority provided by this Act.

(mm) Species held in captivity or controlled environment.

(15) 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 [*16 USCS § 1533(c)*]: *Provided,* That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity. With respect to any act prohibited by subsections (a)(1)(A) and (a)(1)(G) of this ***section*** which occurs after a period of 180 days from (i) December 28, 1973, or (ii) the date of publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of ***section*** 4 of this Act [*16 USCS § 1533(c)*], 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.

(15) (A) The provisions of subsection (a)(1) shall not apply to--

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

(17) 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.

(18) 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.

(nn) Violation of Convention.

(19) 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.

(19) Any importation into the United States of fish or wildlife shall, if--

(20) such fish or wildlife is not an endangered species listed pursuant to ***section*** 4 of this Act [*16 USCS § 1533*] but is listed in Appendix II to the Convention,

(21) 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,

(10) the applicable requirements of subsections (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.

(oo) Imports and exports.

(iii) In general. It is unlawful for any person, without first having obtained permission from the Secretary, to engage in business--

(ii) 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 [*16 USCS § 1533*] 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

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

(iv) Requirements. Any person required to obtain permission under paragraph (1) of this subsection shall--

(iii) 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;

(ii) 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

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

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

(vi) Restriction on consideration of value or 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.

(pp) 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 [*16 USCS § 1533*] 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.

(qq) Designation of ports.

(III) 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 [*16 USCS § 1533*] 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 or ports designated by the Secretary of the Interior. For the purpose 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.

(IV) 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 [enacted Dec. 28, 1973], be deemed to be a port designated by the Secretary under paragraph (1) of this subsection until such time as the Secretary otherwise provides.

(rr) 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***.

History

(Dec. 28, 1973, *P.L. 93-205*, § ***9***, *87 Stat. 893*; Nov. 10, 1978, *P.L. 95-632*, § 4, *92 Stat. 3760*; Oct. 13, 1982, *P.L. 97-304*, § ***9***(b), *96 Stat. 1426*; Oct. 7, 1988, *P.L. 100-478*, Title I, § 1006, Title II, Part III, § 2301, *102 Stat. 2308*, 2321; Nov. 14, 1988, *P.L. 100-653*, Title IX, § 905, *102 Stat. 3835*.)

Annotations

Notes

References in text:

"This Act", referred to in this ***section***, is Act Dec. 28, 1973, *P.L. 93-205*, *87 Stat. 884*, which appears generally as *16 USCS §§ 1531* et seq. For full classification of this Act, consult USCS Tables volumes.

"The effective date of the Endangered Species Act Amendments of 1978", referred to in this ***section***, is probably the date of enactment of *P.L. 95-632*, *92 Stat. 3751*, which is Nov. 10, 1978.

"***Section*** 4(d) of the Act of December 5, 1969 (16 U.S.C. 666cc-4(d)", referred to in this ***section***, is § 4(d) of Act Dec. 5, 1969, *P.L. 91-135*, *83 Stat. 276*, which formerly appeared as 16 USCS § 668cc-4(d), and which was repealed by Act Dec. 28, 1973, *P.L. 93-205*, § 14, *87 Stat. 903*.

Effective date of *section*:

This ***section*** is effective on the date of its enactment on Dec. 28, 1973, as provided by Act Dec. 28, 1973, *P.L. 93-205*, § 16, *87 Stat. 903*, which appears as *16 USCS § 1531* note.

Amendments:

1978 . Act Nov. 10, 1978, in subsec. (b), designated existing provisions as para. (1), and added para. (2).

1982 . Act Oct. 13, 1982, in subsec. (a)(2), redesignated subparas. (B), (C), and (D) as subparas. (C), (D), and (E), respectively, and added a new subpara. (B); and, in subsec. (b), substituted para. (1) for one which read: "The provisions of this ***section*** shall not apply to any fish or wildlife held in captivity or in a controlled environment on the effective date of this Act if the purposes of such holding are not contrary to the purposes of this Act; except that this subsection shall not apply in the case of any fish or wildlife held in the course of a commercial activity. With respect to any act prohibited by this ***section*** which occurs after a period of 180 days from the effective date of this Act, there shall be a rebuttable presumption that the fish or wildlife involved in such act was not held in captivity or in a controlled environment on such effective date.", and, in para. (2)(A), substituted "The provisions of subsection (a)(1) shall not apply to" for "This ***section*** shall not apply to".

1988 . Act Oct. 7, 1988 substituted subsec. (a)(2)(B) for one which read: "remove and reduce to possession any such species from areas under Federal jurisdiction;".

Such Act further substituted subsec. (d) for one which read:

"(d) Imports and exports.

(1) It is unlawful for any person to engage in business as an importer or exporter of 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 without first having obtained permission from the Secretary.

"(2) 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, or plants made by him and the subsequent disposition made by him with respect to such fish, wildlife, or plants;

"(B) at all reasonable times upon notice by a duly authorized representative of the Secretary, afford such representative access to his places of business, an opportunity to examine his inventory of imported fish, wildlife, or plants 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) The Secretary shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subsection.".

Act Nov. 14, 1988, in subsec. (d)(1)(A), substituted "recreational purposes) or plants; or" for "recreational purposes); or".

Other provisions:

Territorial sea of United States. For extension of territorial sea of the United States, see Proc. No. 5928, which appears as 32 USCS § 1331 note.

Human activities within proximity of whales. Act April 30, 1994, *P.L. 103-238*, § 17, *108 Stat. 559*, provides:

"(a) Lawful approaches. In waters of the United States surrounding the State of Hawaii, it is lawful for a person subject to the jurisdiction of the United States to approach, by any means other than an aircraft, no closer than 100 yards to a humpback whale, regardless of whether the approach is made in waters designated under ***section*** 222.31 of title 50, Code of Federal Regulations, as cow/calf waters.

"(b) Termination of legal effect of certain regulations. Subsection (b) of ***section*** 222.31 of title 50, Code of Federal Regulations, shall cease to be in force and effect.".