South Carolina Bar
Continuing Legal Education Division

Wildlife Law and Policy

20-30

Thursday, February 27, 2020

presented by
The South Carolina Bar
Continuing Legal Education Division

http://www.scbar.org/CLE

SC Supreme Court Commission on CLE Course No. 203019

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Wildlife Law and Policy
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This program qualifies for 6.0 MCLE credit hours.
SC Supreme Court Commission on CLE Course #: 203019

8:30 a.m. **Registration**

8:55 a.m. **Welcome and Opening Remarks**

9 a.m. **History of Wildlife Law**
Professor Carol Frampton
Chief of Legal Services, National Wild Turkey Federation, Michigan State University College of Law
Mark Ferrell
South Carolina Department of Natural Resources

9:45 a.m. **North American Model of Wildlife Conservation**
Lane Kisonak
Legal Counsel, Association of Fish and Wildlife Agencies, Washington DC

10:30 a.m. **Break**

10:45 a.m. **South Carolina Game Laws**
Craig Jones
Chief Legal Counsel for SCDNR
Lee Ellis
South Carolina Department of Natural Resources

12 p.m. **Lunch (on your own)**

1 p.m. **State Constitutional Rights to Hunt and Fish Provisions**
Professor Carol Frampton

1:30 p.m. **Animals as Property v. Nonhuman Property v. Animal Rights**
Michael Jean
Deputy Counsel, NRA-ILA

2:15 p.m. **Break**

2:30 p.m. **The State's Role in Managing Wildlife on Federal Lands**
Lane Kisonak
Legal Counsel, Association of Fish and Wildlife Agencies, Washington DC

3:15 p.m. **Federal Protection for Species**
Parks Gilbert, Attorney, Washington, DC

4 p.m. **The American System of Conservation Funding**
Chris Segal, Attorney, Washington, DC

4:30 p.m. **Adjourn**

Networking Reception Immediately Following

Wildlife Law and Policy

SPEAKER BIOGRAPHIES
(by order of presentation)

Professor Carol Frampton

Chief Legal Services, National Wildlife Turkey Federation, Michigan State University College of Law
Edgefield, SC
(course planner)

Carol is a graduate of the University of Illinois and the Thomas M. Cooley Law School in Lansing, Michigan. She is the Chief of Legal Services and in-house counsel for the National Wild Turkey Federation in Edgefield, SC. She was former General Counsel to Association of Fish & Wildlife Agencies in Washington, DC, which is the professional organization for all 50 state fish, and wildlife agencies. She serves as pro bono counsel to the Council to Advance Hunting and Shooting Sports and several other hunting and recreational shooting nonprofit organizations. She started practicing conservation law in 1985 as in-house counsel for the Michigan United Conservation Clubs, in Lansing, Michigan, which had 470+ affiliated conservation gun clubs. She was former Chief of Legal Services and Legislative Director to the Michigan Department of Natural Resources. She was an adjunct professor at Cooley Law School developing law classes in the Second Amendment, Natural Resources, Oil and Gas Law. She has taught Wildlife Law and Energy Law and its Impacts to Wildlife at Michigan State University Law College, East Lansing, Michigan for the past eight years. She helped developed the law school's conservation law program.
Carol is a long-serving NRA Board Member including Chair of Bylaws and Resolutions; Vice Chair of Women's Policies, member of the Hunting and Conservation Committee, Blue Ribbon Committee for the Hunters Leadership Forum, Legal Affairs committee and member of the NRA Executive Committee. She is the Chair of the NRA National Firearms Law Seminar, which offers annually an eight-hour national CLE program on firearm laws and current issues held during the NRA annual meeting. She is a Trustee and Vice-Chair of the NRA Civil Rights Defense Fund. She is a member of Safari Club International, and the Boone and Crockett Club. She was the 2017 award winner of National Wild Turkey Federation's Lynn Boykin Hunting award and NRA's Sybil Ludington Freedom award. She enjoys hunting whitetail deer, turkey and big game hunting in S. Africa and Australia and -- fishing Alaska.

LCPL Mark Ferrell

SC Department of Natural Resources Law Enforcement

LCPL Mark Ferrell graduated from University of South Carolina with bachelor’s degree in criminal justice in 2003 and was a deputy at the York county sheriff’s office for four years. He has worked as a Game Warden with the South Carolina Department of Natural Resources for twelve years.

Lane Kisonak

Legal Counsel, Association of Fish & Wildlife Agencies
Washington, DC

Lane Kisonak is Legal Affairs Manager for the Association of Fish and Wildlife Agencies (AFWA) in Washington, D.C. Lane leads the implementation of AFWA's Legal Strategy for raising awareness of state fish and wildlife conservation authority, filing briefs as amicus curiae, and developing legal education opportunities for aspiring and current practitioners. He also advises AFWA's Executive Director and Executive Committee on nonprofit corporate governance and supports AFWA's government and scientific affairs staff with publications, legislative initiatives, and regulatory comments.

Prior to joining AFWA in 2016, Lane graduated from the George Washington University (GWU) Law School. As a law student he worked for the U.S. Senate Judiciary Committee, an environmental nonprofit organization, a solo practitioner in energy and environmental law, and GWU Law's international human rights clinic.

Lane is a member of the D.C. Bar and is admitted to practice before the U.S. Court of Appeals for the Tenth Circuit. He is also a member of the International Union for the Conservation of Nature's (IUCN) World Commission on Environmental Law.

Craig Jones

Chief Legal Counsel, SC Department of Natural Resources
Columbia, SC

No biography submitted

Captain Lee E. Ellis

SC Department of Natural Resources Law Enforcement
Columbia, SC

Captain Lee Ellis has been a law enforcement officer in SC for 30 years. He began his career at the North Charleston Police Department before being hired by the SCDNR in March of 2000. He has served as a field game warden, training Staff Sergeant, field unit 1st Sergeant, and is currently the administrative Captain. His duties include management of the records and intelligence unit, grants, administrator for the Inter-State Wildlife Violators Compact, administrator for the Inter-State Boating Violators Compact, administration of the Operation Game Thief Program, and oversees the Training Unit. He currently serves as President of the International Wildlife Crimestoppers which represents 41 states and 9 Canadian provincial agencies in the anti-poaching effort across North America. Captain Ellis received a Bachelor of Science from Limestone College in Business Management and holds a dual Master of Arts from Webster University in Human Resource Management and Human Resource Development.

Michael Jean

Deputy Counsel, National Rifle Association of America – Institute for Legislative Action
Fairfax, VA

Michael Jean received Bachelors of Arts degrees in Criminal Justice and American Public Policy from Western Michigan University. He went on to law school at the Western Michigan University – Thomas M. Cooley Law School. During this time, he participated as a guest student at: the Monash University Law Faculty, in Melbourne, Australia; the University of Canterbury School of Law, in Christchurch, New Zealand; the University of Toronto, in Toronto, Canada; and the University of San Diego's Paris Institute on International and Comparative Law in Paris, France. He clerked for the Criminal Division of the 3rd Judicial Circuit Court of Michigan, in Detroit, and finished law school as a litigation intern at Safari Club International, in Washington, DC.

He was admitted to the State Bar of Michigan, and joined the Office of Litigation Counsel at the National Rifle Association of America – Institute for Legislative Action in May of 2012. Since then, he has been litigating wildlife, shooting range, and Second Amendment matters in state and federal courts, and advising private attorneys and NRA members on restoration of rights.

He is also a member of the District of Columbia Bar and a member of the National Association of Criminal Defense Lawyers.

Parks Gilbert

Washington, SC

Parks received his bachelor's in English at Birmingham-Southern College in 2007 and his J.D. at the University of Alabama in 2010. He worked for Cabaniss, Johnston, Gardner, Dumas & O'Neal in Birmingham, AL, in 2010 and 2011, supporting defense of business clients in the healthcare, transportation, and finance industries, as well as estates matters. In 2012, Parks attended Lewis & Clark Northwestern School of Law in Portland, OR, earning his LL.M. in environmental law. From 2013-2016, Parks worked for the Association of Fish and Wildlife Agencies as a staff attorney, focusing on the Association's legal strategy to advance wildlife law education. He also supported the Association's legal and policy priorities, as well as some corporate matters. In 2016, Parks began working for the U.S. Fish and Wildlife Service as the Endangered Species Act Litigation Specialist, where he coordinates with Interior Department counsel, Department of Justice counsel, and agency staff to support and manage its ESA caseload. He is licensed to practice law in Alabama (inactive) and the District of Columbia.

Chris Segal

Law Offices of Lowell E. Baier
Washington, SC

Christopher Segal was born and raised in Philadelphia, Pennsylvania, where he attended Germantown Friends School. He studied history at Swarthmore College, graduating with honors, and Religion at the University of Pennsylvania, before receiving his J.D. in 2010 from Georgetown University. After graduating he clerked for the Honorable Gale E. Rasin in the Criminal Division of the Maryland Circuit Court for Baltimore City. Since 2011 he has lived in Arlington, Virginia, working for Lowell E. Baier as a Wildlife and Natural Resources Attorney. His work for Lowell has included drafting legislation, preparing congressional testimony, advocating for public lands, and researching and writing books and law review articles. He played a significant role in researching Lowell's 2016 book *Inside the Equal Access to Justice Act: Environmental Litigation and the Crippling Battle over America's Lands, Endangered Species, and Critical Habitats* and helped write Lowell's 2020 book *Saving Species on Private Lands: Unlocking Incentives to Conserve Wildlife and Their Habitats*. He is a member of the Bar in Maryland and the District of Columbia.

South Carolina Bar
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History of Wildlife Law

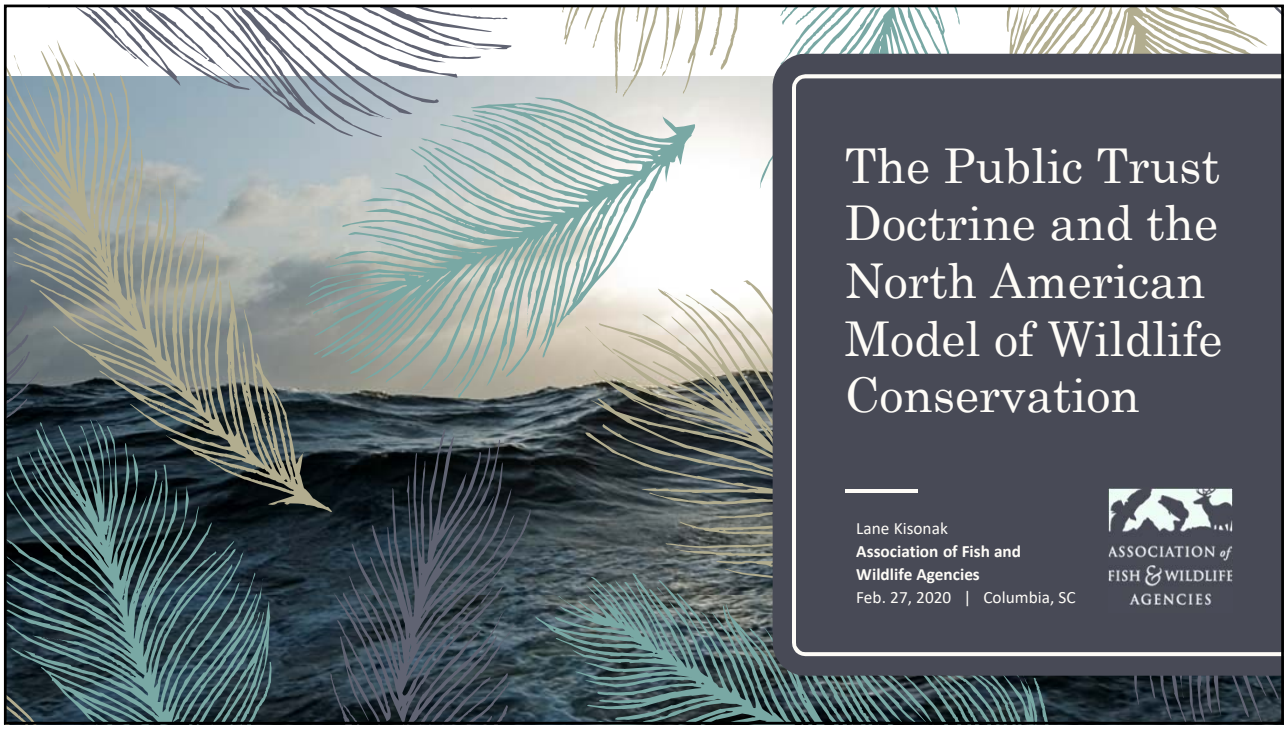
Prof. Carol Frampton
Mark Ferrell

South Carolina Bar

Continuing Legal Education Division

North American Model of Wildlife Conservation

Lane Kisonak



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1) **Public and navigable waters and the origins of the wildlife trust**
   Riparian doctrine, first appropriation, wildlife trust, etc.
2) **Access and development**
   Background principles, shorelines and residential developments, legal instruments
3) **Atmospheric trust litigation and other new frontiers in the public trust**
   Federal public trust, elements of standing, public property interests in air
4) **Influences on PTD as applied to state-managed wildlife**
   Sources of PTD, GHGs vs. streambeds & waterways, substantial impairment standards
5) **Fitting into the North American Model of Wildlife Conservation**
   The Model as a synthesis; democracy of hunting; challenges

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Central Questions

1. What are the limits on state impairment of public trust resources with respect to federal authority and multiple state uses?
2. What affirmative duties does a state have to protect public trust resources?
3. Where do the public trusts in wildlife and non-wildlife resources overlap or diverge?
4. In the future, will the public trust doctrine empower or disempower state agencies in wildlife management?
5. What will the North American Model have to say about the public trust as the 21st century progresses?

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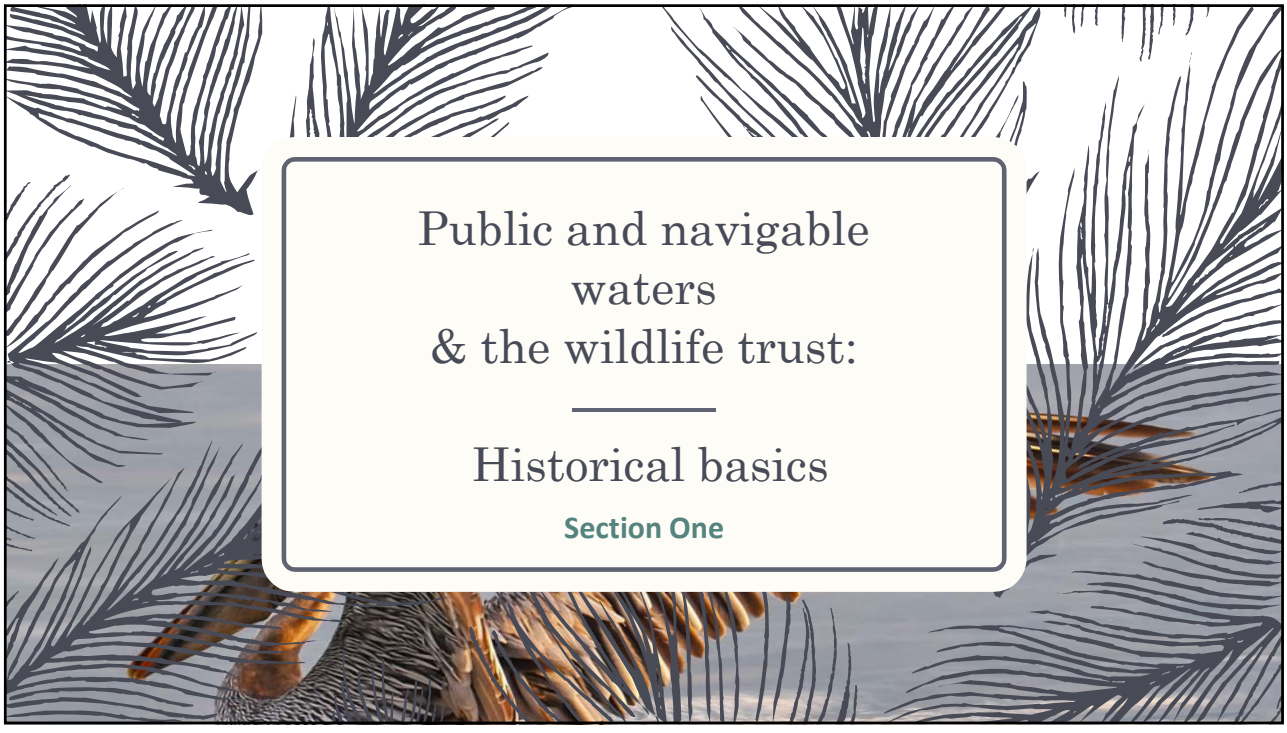

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REVIEW: The wildlife trust

- **Origins in antiquity and English common law**
- ***Geer v. Connecticut*, 161 U.S. 519 (1896):**
  - Held that states own wild animals within their borders, and can conduct wildlife management and harvest operations
- ***Hughes v. Oklahoma*, 441 U.S. 332 (1979):**
  - Held that Congress may enact legislation governing wildlife on federal lands, and federal law will preempt any conflicting state law

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Public trust in groundwater

- ***In re Water Use Permit Applications* (Waiāhole), 9 P.3d 409 (Haw. 2000):**
  - Public trust encompasses "all water resources without exception or distinction" – Haw. Const. art. I, §§ 1, 7
    - *Includes groundwater*
    - *There is no dichotomy between surface water and groundwater—each depends on the other*
- ***Mineral County v. State Dept. of Conserv. & Nat. Resources*, 117 Nev. 235 (Nov. 2001):**
  - Cites *Waiāhole* for expansion of PTF to ecological / recreational uses

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Navigable waters as another basis for trust in wildlife

- Actual development of wildlife PTD is relatively static compared to PTD for water resources
  - ***Glisson v. City of Marion*, 720 N.E.2d 1034, 1045 (Ill. 1999):**
    - *Under Illinois constitutional provision for healthful environment, Court allowed standing to seek injunction of dam on creek that would harm state listed species (BUT: dismissed b/c public health, not species, were the target of protections)*
  - ***CBD v. FPL Grp., Inc.*, 83 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008):**
    - *Court declined to enjoin operation of wind farms harming raptors and other birds—but noted that state fish and wildlife regulators would be the proper targets for a PTD claim*

See 45 U.C. Davis L. Rev. 665, 671-73 (2012)

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Access and development

Section Two

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Finding the PTD in "background principles"

- ***Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992):**
  - Issue of taking turns on State's power to determine the "bundle of rights" owners acquire with title
  - No compensation is required if a regulation "simply makes explicit what already inheres in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership"
- ***Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002):**
  - Denial of shoreline development affirmed based on WA background principles (state statute = implicit expression of the PTD)

See 82 Notre Dame L. Rev. 699 (2006)

See 43 B.C. Envtl. L. Rev. 575, 599 (2016)

See 43 B.C. Envtl. L. Rev. 931, 943-47 (2016)

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Litigation over coastal development

- ***Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112 (N.J. 2005):**
  - Upland sands of a privately owned beach must be made available to the public under PTD
    - *Reasonable access to foreshore + suitable area for recreation on dry land determined by 4 factors:*
      1. Location of dry sand relative to foreshore
      2. Extent / availability of publicly owned upland sand area
      3. Nature / extent of public demand
      4. Usage of upland sand area by owner
  - Setback regulations may take a back seat to PT analysis as sea-level rise occurs

See 43 B.C. Envtl. L. Rev. 575, 589-90, 599 (2016)

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New types of legal instruments

- **Rolling easements:**
  1. Prohibit (and reduce the need for) hard shoreline armoring (ensuring continued public access)
  2. Require movement / abandonment of any structure when the shoreline reaches it
     - *Possible benchmarks: Dune vegetation line, mean high water, upper bound of tidal wetlands*
  3. Define the boundary between public and private lands with reference to statutory framework that can clarify obligations
- **Rolling trusts:**
  - Follows wildlife as it moves, allowing no-longer-useful land to be impaired

See Rolling Easements (EPA 430R11001) (2011), at 19

See 95 Neb. L. Rev. 649, 697 (2016)

See 43 B.C. Envtl. L. Rev. 575, 589-90, 599 (2016)

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Atmospheric trust litigation and other new frontiers in the public trust

Section Three

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The (Non)-Existent Federal Public Trust

- ***Horne v. Dep't of Agriculture*, 135 S.Ct. 2419 (June 22, 2015):**
  - USDA raisin marketing reserve requirement = clear physical taking
  - Distinguishes ***Leonard v. Earle*, 279 U.S. 392 (1929)**, where oyster packers were required to remit 10% of oyster shells (or cash value) to the State
    - *"Raisins are not like oysters", i.e., not ferae naturae belonging to the state*
      - Recognizes state wildlife trust; SEE ALSO:
- ***Citizens Legal Enforcement & Restoration v. Connor*, 762 F. Supp.2d 1214 (S.D. Cal. 2011):**
  - PTD complaint not available under federal Administrative Procedure Act (APA)
  - PTD entails discretion without an enforceable standard; **BUT:**

- **Federal common law and PTD:**
  - Some argue that *Illinois Central* did not apply state law to reach its outcome
  - Subsequent cases in dicta construed PTD from *Illinois Central* to have been a state question; recent scholarship is questioning this school of thought (*see esp. Appleby v. City of New York*, 271 U.S. 364, 364-66, 380 (1926)
  - *Missouri v. Holland*: Protection of wild birds = "national interest of very nearly the first magnitude"

See 45 Envtl. L. 399, 410-18 (2015)

See 16 Hastings W.-Nw. J. Envtl. L. & Pol'y 113, 138-39 (2010)

See 6 Ariz. J. Envtl. L. & Pol'y 534 (2016)

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Elements of Standing in Federal Courts

- **Standing factors:**
  1. Injury in fact -> [Wildlife claim vs. surface water / groundwater claim?]
  2. Causal connection between injury and conduct complained of -> [Failure of regulator to allocate / ration water or other resources?]
  3. Capability of injury to be redressed by a favorable decision [Would application of the PTD fix the problem?]
- Are these factors versatile enough that analyses like ***Waiāhole* (Haw. 2000)** and ***CBD* (Cal. 2008)** may be carried forward in federal court?

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Public Property Interests in Air & Atmospheric Trust

- ***Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221 (N.M. Ct. App. 2015):**
  - Opinion notes that courts in other states declined to find an atmospheric PTD b/c state courts had declined to do so, or b/c no other federal courts had done so, or b/c states had declined to extend PTD to forests or lands in general
  - Atmospheric arguments must be asserted through existing constitutional and statutory frameworks
    - *Where state GHG / air quality regulations exist, they prevail*
    - *Separation of powers*
- ***State of Ga. v. Tenn. Copper Co.*, 206 U.S. 230 (1907)**
  - Public nuisance case (TN -> GA noxious fumes)

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Public Property Interests in Air & Atmospheric Trust (cont'd) — *Juliana*

- ***Juliana v. U.S.*, No. 6:15-cv-01517-TC (D. Or. Nov. 10, 2016):**
  - DENIAL OF MOTION TO DISMISS: GHG emissions not a political question; plaintiffs have standing; climate is a fundamental right / PT enforceable by private citizens
    - *Due process: Right to "a climate system capable of sustaining human life is fundamental to a free and ordered society"; gov't is obligated to act under the "danger creation" exception to general lack of obligation*
    - *Public trust: Different from prior cases where plaintiffs challenge alienation of public trust resource*
      1. Ocean acidification / rising temps. -> harm to public trust assets (submerged lands 3-12 miles from U.S. coastlines)
      2. Limitation of PTD to states cannot apply to assets owned by Federal gov't
      3. CAA / CWA do not "legislate[] away" public trust claims (PT is an "inherent attribute[] of sovereignty"
      4. Ps' right to enforce gov't obligation as trustee arises from U.S. Const. amend. V

"There is hardly any political question in the United States that sooner or later does not turn into a judicial question." 1 Alexis de Tocqueville, Democracy in America 440 (Liberty Fund 2012) (cited in *Juliana*)

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Public Property Interests in Air & Atmospheric Trust (cont'd) — *Juliana*

- ***Juliana v. U.S.*:**
  - Ninth Circuit sent case back to district court for dismissal on Jan. 17, 2020
  - Court reaffirmed that plaintiffs showed first 2 elements of Article III standing (injury and causation) but did not meet the 3rd (redressability)
    - Plaintiffs did not have same procedural hook as states did in Massachusetts v. EPA (2007)
    - Courts did not want to take on separation of powers or policymaking challenges
  - Majority did not find climate change mitigation to be a political question, but did cite the Property Clause against plaintiffs

OPINION: Plaintiffs "seek to enjoin Congress from exercising power expressly granted by the Constitution over public lands…"

DISSENT: "It is as if an asteroid were barreling toward Earth and the government decided to shut down our only defenses. Seeking to quash this suit, the government bluntly insists that it has the absolute and unreviewable power to destroy the Nation."

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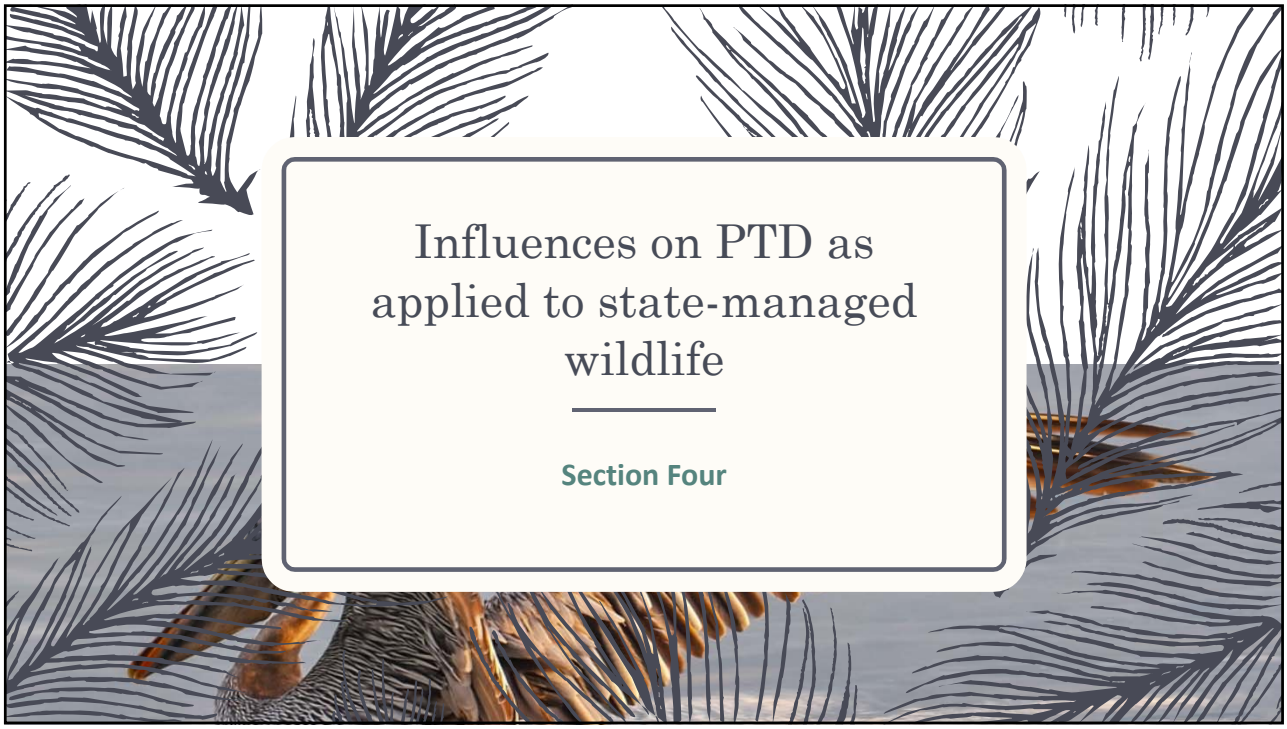

Influences on PTD as applied to state-managed wildlife

Section Four

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Sources of the Public Trust Doctrine

- ***CBD v. FPL Group*** (*supra*, slide 8):
  1. PTD requires agencies to consider how approved actions will affect wildlife
  2. Private citizens may show standing to enforce the public trust over wildlife
  3. A PTD claim must be brought against agencies responsible for wildlife
  4. Courts must afford a high level of deference to agencies' oversight

"[T]here is no reason in principle why members of the public should be denied standing to maintain an appropriate action."

"Whatever its historical derivation, it is clear that the public trust doctrine encompasses the protection of undomesticated birds and wildlife."

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GHGs vs. Streambeds and Waterways

- ***Foster v. Wash. Dep't of Ecology*, No. 14-2-25295-1 SEA (Wash. Super. Ct. Nov. 19, 2015) (*Foster* II):**

"Current science makes clear that global warming is impacting the acidification of the oceans to alarming and dangerous levels, thus endangering the bounty of our navigable waters….The navigable waters and the atmosphere are intertwined and to argue a separation of the two, or to argue that GHG emissions do not affect navigable waters is nonsensical."

"[T]he State has a constitutional obligation to protect the public's interest in natural resources held in trust for the common benefit of the people….If ever there were a time to recognize through action this right to…a healthful and pleasant atmosphere, the time is now."

See 6 Wash. J. Envtl. L. & Pol'y 633, 675-76 (2016)

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Administrative Review & Case Management

- Managing the remedy is often the most difficult part of any environmental / natural resource litigation
  - In atmospheric trust litigation, scholars generally foresee no direct management by the Court, but predict general oversight of recovery plans, including measurable steps
  - Structural injunctions (long term) respond to "myriad of scientific and management challenges"

- **Little NEPAs:**
  - Usually there is no set "procedural matrix" for determining whether a state is in compliance w/ PTD; state environmental review statutes may suffice
    - *See* ***Citizens for East Shore Parks v. Cal. State Lands Cmm'n, 136 Cal. Rptr. 3d 162 (Cal. App. 1st Dist. 2011)***

See 16 Pub. Land L. Rev. 87, 114 (1995)

See 2 Widener L. Symp. J. 235 (1997)

See 6 Wash. J. Envtl. L. & Pol'y 633, 667-68 (2016)

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Substantial Impairment Standards

- ***Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892):**
  - "Substantial impairment" of a public trust resource is forbidden
    - *In Illinois Central, the impairment was sale to private owners*
    - *Encroachment on the resource is not forbidden*
      - NOT a clear standard, BUT abdication of protective responsibilities is a close approximation
- Example: Louisiana includes <u>all</u> natural resources in its PTD (La. Const. art. IX, §1 (1974)
  - Development of resources OK "insofar as possible and consistent with the health, safety, and welfare of the people"

See 29 Tul. Envtl. L.J. 149, 205 (2017)

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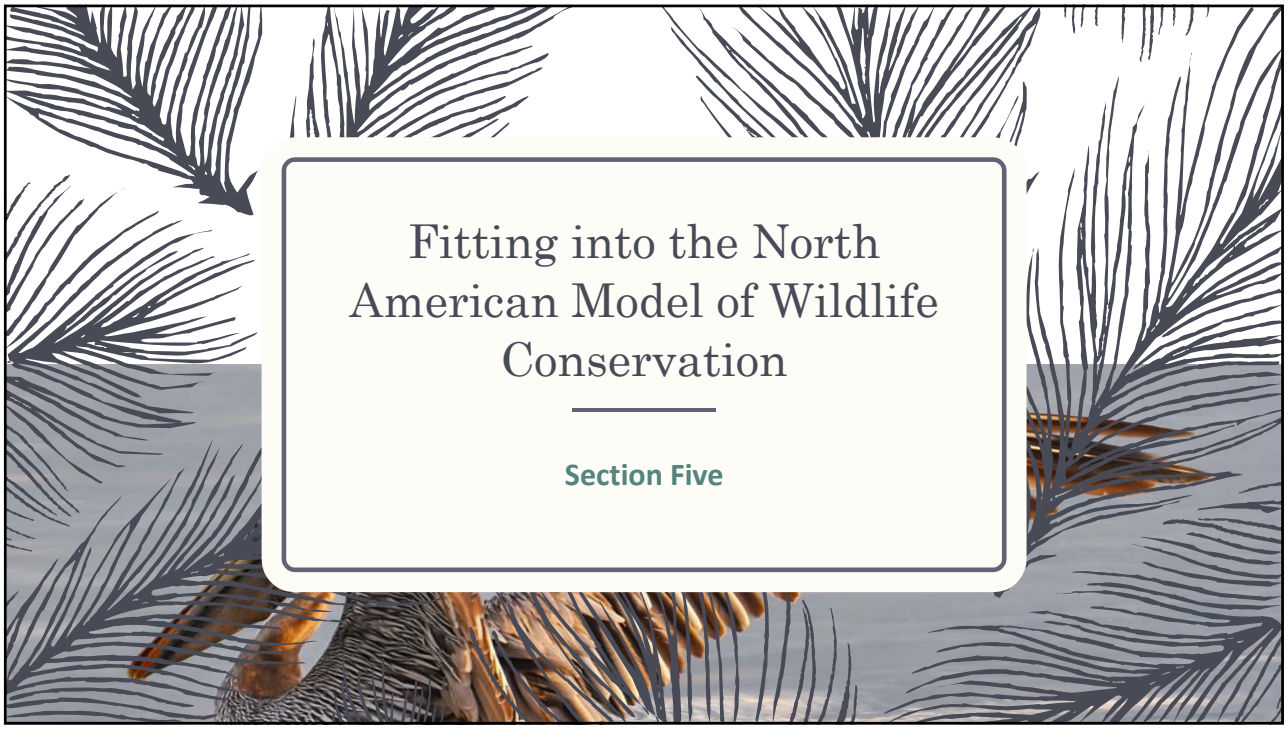

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The North American Model

1. **Wildlife resources are conserved and held in trust for all citizens.**
2. Commerce in dead wildlife is eliminated.
3. Wildlife is allocated according to democratic rule of law.
4. Wildlife may only be killed for a legitimate, non-frivolous purpose.
5. Wildlife is an international resource.
6. **Every person has an equal opportunity under the law to participate in hunting and fishing.**
7. Scientific management is the proper means for wildlife conservation.

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The North American Model

- **Model:** "[D]escription of a system that accounts for its key properties"
- Applies to wildlife conservation in Canada and the United States
- It is always developing in new directions and responding to new situations and challenges, reflecting its 100+ year history
- Resource exploitation in 18th and 19th centuries:
  - Industrial Revolution; fur trade; urbanization
  - Market-hunting; interstate railways; refrigeration
  - Leisure; wildlife enthusiasm; sportsperson-conservationists
  - Founding of early conservation organizations (B&C, Audubon)
  - Lacey Act, MBTA…
- Restrictive hunting laws + active restoration; professionalization of wildlife management

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The North American Model

- **Funding:** User-pay, user-benefit (American System of Conservation Funding)
  - Licenses, permit fees, motorboat fuel tax, excise taxes on firearms, ammunition, bows, arrows, angling products
  - PR-DJ = permanent appropriations (except for Wallop-Breaux), apportionment based on population and area formula
  - Increasing state emphasis on non-game species since 2000 (SWG program, etc.) and alternate funding sources
- **Politics:** What is the role of politics in making law, delivering science, selecting priorities?

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The North American Model

Wildlife resources are conserved and held in trust for all citizens.

- Challenges IDed in 2012 TWS technical review:
  - Inappropriate claims of ownership of wildlife / captive-breeding / ambiguous
  - Unregulated commercial sale of live wildlife – analogous to 19th C. situation?
  - Prohibitions or unreasonable restrictions on access to wildlife
  - Novel forms of animal rights litigation, as opposed to animal welfare regimes

Every person has an equal opportunity under the law to participate in hunting and fishing.

- Challenges IDed in 2012 TWS technical review:
  - Reduction in and access to public lands
  - Ballot initiatives

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The North American Model

- Courts have generally found that hunting is a privilege, not a right (e.g., *Baldwin v. Fish & Game Commission of Montana*, 436 U.S. 371 (1978)), but there has been some connection between hunting and the modern PTD in certain states (both affirmative and negative).
  - Cases in California and Michigan have found that pursuit of game is a privilege subject to withdrawal.
  - Some litigation has arisen based on an implied right to hunt.
  - Some anti-hunting litigants have used the PTD to request injunction on state-permitted sport hunting.

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The North American Model

- **Example of PTD in wildlife management litigation upholding state management authority:**
  - ***Hill v. Missouri Dep't of Conservation*, No. SC96739 (Mo. Sup. Ct. 2018):**
    - Captive cervids are "game" and "wildlife" under Missouri Const. art. IV, sec. 40(a)
    - Missouri Conservation Commission may regulate captive cervids as "wildlife" and "resources of the state"
    - Commission's regs on captive deer facilities do not infringe upon their right to "engage in farming and ranching practices"
  - ***Bailey v. Texas Parks & Wildlife Dep't*, 03-17-00703-CV (Tex. Ct. App., 3d Dist. 2019):**
    - Deer bred under license are still owned by the people of TX, and cannot be sold or transferred w/o permit
    - A deer breeder has only a possessory interest in the deer, which TPWD's CWD rules do not interfere with
    - When the state grants a permit to use a resource, the state retains its rights; possessory interest is good only against third parties, not the state

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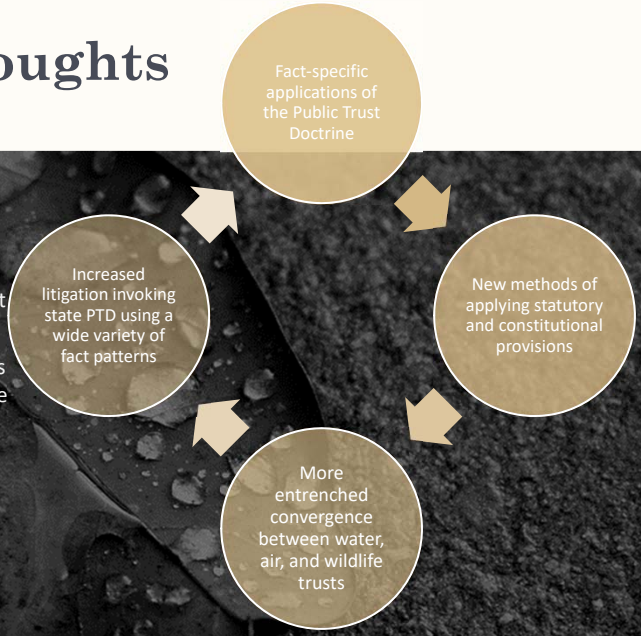
Concluding Thoughts

- California alone has seen at least 5 PTD cases since 2008
- Federal courts in multiple states are expanding the boundaries of the public trust doctrine in different but overlapping ways
- Stretching of PTD may have unintended consequences for state fish / wildlife agencies that rely on it as a core precept of the North American Model of Wildlife Conservation
- North American Model may be increasingly cited in courts and in statutes
- Human dimensions – getting a better handle on the wildlife-user base and communications priorities



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South Carolina Bar
Continuing Legal Education Division

South Carolina Game Laws

Craig Jones
Captain Lee Ellis

South Carolina Bar

Continuing Legal Education Division

State Constitutional Rights to Hunt and Fish Provisions

Prof. Carol Frampton

South Carolina Bar

Continuing Legal Education Division

Animals as Property v. Nonhuman Property v. Animal Rights

Michael Jean

Human rights for animals and natural resources.

February 27, 2020 – Columbia, South Carolina
Michael T. Jean
Associate Litigation Counsel – NRA-ILA
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1

Why is wildlife law important?

- William Penn attracted settlers to Pennsylvania by granting them the right to hunt and fish—rights that they did not have in the U.K.

  Jeffrey Omar Usman, *The Game Is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 77 Tenn. L. Rev. 57, 75 (2009).

- The Drafters of the SC Constitution of 1776 thought revolution was justified because the Crown "depriv[ed] many thousands of people of the means of subsistence, by restraining them from fishing on the American coast."

  S.C. Const of 1776 pmbl.

- "[T]he right to hunt on unenclosed and uncultivated lands has never been disputed[;] ... a civil war would have been the consequence of an attempt, even by the legislature, to enforce a restraint on this privilege."

  McConico v. Singleton, 9 S.C.L. 244, 351–52 (S.C. Const. App. 1818).

2

The NRA Hunters' Leadership Forum legal-research project.

- Through a grant from the Hunters' Leadership Forum, the NRA has been researching and cataloging scholarly literature, published by animal-rights groups that relate to hunting, wildlife management, animal-welfare law, and other related fields.

3

The rise of animal law in academia

The Big Picture

4

Academia, and law schools in particular, began to change in the late 90s.

- The last of the Greatest Generation (1901-1927) retire.
- The law-school boom started in the 90s.

https://heterodoxacademy.org/professors-moved-left-but-country-did-not/

5

The rise of animal-law classes, student groups, and institutes in law schools.

- In the late 1990s, "there were only perhaps one or two animal law courses being taught at United States law schools."
- By 2007, there were "approximately seventy, with most of the nation's elite law schools represented."

Richard L. Cupp Jr., *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood As Stepping Stones Toward Abolishing Animals' Property Status*, 60 SMU L. Rev. 3, 4 (2007).

- Today, there are roughly 166 animal-law courses offered in the U.S. and Canada.

https://www.law.com/texaslawyer/sites/texaslawyer/2017/11/13/animal-law-clinics-become-pet-projects-at-law-schools/?slreturn=20180123130419.

6

Animal-law student groups.

- The Animal Legal Defense Fund has 201 law-school chapters in the U.S.

https://aldf.org/article/list-of-current-student-chapters/.

7

Animal-law clinics and institutions.

- Lewis and Clark Law School partnered with the ALDF to launch the Center For Animal Law Studies in 2008.

https://law.lclark.edu/centers/animal_law_studies/about_us/

- Today, The University at Buffalo School of Law, Michigan State University College of Law, and the South Texas College of Law – Houston have added animal-law clinics, too.

https://www.law.com/texaslawyer/sites/texaslawyer/2017/11/13/animal-law-clinics-become-pet-projects-at-law-schools/.

8

Law-school clinics tend to be sloppy in their practice.

- A group out of the University of Denver College of Law, "sue[d] Steven Williams in his capacity as Director of FWS, when Mr. Williams had not been Director for several years at the time of filing."

  Friends of Animals v. Salazar, 696 F. Supp. 2d 16, 20 (D.D.C. 2010).

- The Lewis and Clark Aquatic Animal Law Initiative botched the filing of their amicus brief, twice: once for not signing, dating, and submitting paper copies; once for not submitting Corporate Disclosure Statements.

  See Docket entries for 2/15/2018 and 2/16/2018 in *People for the Ethical Treatment of animals, et al v. Miami Seaquarium, et al*, Case No. 16-14814 (11th Cir.).

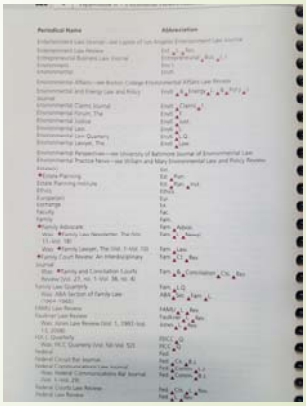
9

The rise of law journals.

- There are 51 pages of periodicals listed in Appendix 5 of ALWD. *ALWD Guide to Legal Citation* 507-58 (5th ed. 2014).
- There are at least eleven legal journals dedicated to animal law; all were established since 1994.

  https://animal.law.harvard.edu/resources/animal-law-journals/

- Most Journals are published at least twice, if not more, per year, which makes them desperate for content.



10

Law journals have lost their prestige.

- Law reviews are not "particularly helpful for practitioners and judges." Chief Justice Roberts.
- "There is evidence that law review articles have left terra firma to soar into outer space." Justice Breyer.
- Law reviews were cited in about half of all Supreme Court opinions in the 70s and 80s, but are now only cited in 37.1% of the opinions.

Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court Justices: An Empirical Analysis*, 4 Drexel L. Rev. 399, 404 (2012).

11

Law journals are student run and aren't peer reviewed.

- "Our scholarly journals are in the hands of incompetents." James Lindgren (Professor of Law, Northwestern University).
- The student editors favor articles submitted by professors from their law school. These home-school articles tend to be cited less than articles written and submitted by professors from other schools.

https://academic.oup.com/jla/article/5/2/309/859340

12

Other fields of scholarly literature have lost their prestige, too.

Field of study	Percentage of literature that is never cited
Medicine	12%
Natural Sciences	27%
Social Sciences	32%
Law	43% (figure from 2005)
Humanities	82%
https://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=642863	https://blogs.lse.ac.uk/impactofsocialsciences/2014/04/23/academic-papers-citation-rates-remler/

13

Article III Standing

14

The traditional three-part standing test.

- "Our cases have established that the 'irreducible constitutional minimum' of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."

Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016).

15

Injury in fact.

- "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"

Id. at 1548 (citation omitted)

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concrete *and* particular injury.

- "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way."' It must be '"distinct."'

Id. at 1548.

- "Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete."'

Id.

- "A 'concrete' injury must be '*de facto*'; that is, it must actually exist. When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.' Concreteness, therefore, is quite different from particularization."

Id.

17

Spokeo's holding.

- "Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."

Id. at 1450.

18

Injury in fact for declaratory and injunctive relief.

- "As a general rule, 'where the plaintiffs seek declaratory and injunctive relief, past injuries alone are insufficient to establish standing.' Instead, Plaintiffs must 'establish an ongoing or future injury that is "certainly impending.'""

  Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Homeland Sec., 387 F. Supp. 3d 33, 47 (D.D.C. 2019) (internal citations omitted); *S.C. Dep't of Soc. Servs. v. Almeida*, No. 2004-UP-437, 2004 WL 6331251, at *2 (S.C. Ct. App. July 26, 2004) (citations omitted)

19

The animal-rights "scholar's" position on standing.

- "Decisions regarding the standing of animals bear no resemblance to principled application of legal rules; they are nothing more than the raw exercise of power over helpless creatures."

  Elizabeth L. DeCoux, *In the Valley of the Dry Bones: Reuniting the Word "Standing" with Its Meaning in Animal Cases*, 29 Wm. & Mary Envtl. L. & Pol'y Rev. 681, 682 (2005).

20

The Public Trust Doctrine.

- The states own wildlife "as a trust for the benefit of the people, and not ... for the benefit of private individuals as distinguished from the public good."

  Geer v. State of Conn., 161 U.S. 519, 529 (1896) (*overruled on other grounds by Hughes v. Oklahoma*, 441 U.S. 322 (1979)); *O'Brien v. State*, 711 P.2d 1144, 1148–49 (Wyo. 1986); *Pullen v. Ulmer*, 923 P.2d 54, 60 (Alaska 1996).

- "All wild birds, wild game, and fish ... are the property of the State."

  S.C. Code Ann. § 50-1-10.

- The states also own navigable waters in their sovereign capacity, for the benefit of the people.

  Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 31, 766 S.E.2d 707, 716 (2014).

21

The animal-rights lawyers position on standing and the Public Trust Doctrine.

- "The [public trust doctrine's] beneficiary interest should qualify as a protected property right because individual members of the public can reasonably expect the sovereign to respect it, making the [public trust doctrine], if not a core property interest, at least an entitlement."

  Michael O'Loughlin, *Understanding the Public Trust Doctrine Through Due Process*, 58 B.C. L. Rev. 1321, 1339–40 (2017).

- "[W]hen a proposed government action threatens public access or use of a protected resource, some courts have treated the [public-trust doctrine] as presumptive grounds for standing for any member of the public."

  Id. at 1341-42.

22

Some state supreme courts agree with them.

- "If the 'public trust' doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time."

  Paepcke v. Pub. Bldg. Comm'n of Chicago, 263 N.E.2d 11, 18 (Ill. 1970); *City of Wilmington v. Lord*, 378 A.2d 635, 637–38 (Del. 1977); *Akau v. Olohana Corp.*, 652 P.2d 1130, 1134 (Haw. 1982); *Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 431 n.11 (1983).

23

The South Carolina Supreme Court does not.

- "[W]e begin our discussion of the public trust claim with the fact the plaintiffs do not allege that any public trust asset has been lost as a result of any withdrawal of surface water that has already been made by any agricultural user.... This fact alone ends the justiciability analysis for the public trust claim. *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (holding there must be an 'injury in fact' for standing to exist)."

  Jowers v. S.C. Dep't of Health & Envtl. Control, 423 S.C. 343, 360–61, 815 S.E.2d 446, 455 (2018); *Ex parte State ex rel. Wilson*, 391 S.C. 565, 574, 707 S.E.2d 402, 407 (2011).

24

Public Trust v. Public Nuisance

- The public-trust doctrine is a property doctrine; public nuisance is a tort doctrine.
- To maintain a public-nuisance claim in South Carolina, the plaintiff must suffer a "special or particular injury," which is "satisfied only by injury to the individual's real or personal property."

Overcash v. S.C. Elec. & Gas Co., 364 S.C. 569, 575, 614 S.E.2d 619, 622 (2005).

- Because wildlife is the property of the state, individuals have no property rights in the wildlife.

Bilida v. McCleod, 211 F.3d 166 (1st Cir. 2000).

25

Informational injuries.

- "A plaintiff suffers sufficiently concrete and particularized informational injury where the plaintiff alleges that:
  - (1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and
  - (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure."

Friends of Animals v. Jewell, 828 F.3d 989, 992 (D.C. Cir. 2016).

26

Spokeo limited the scope of informational injuries.

- "*Jewell* is thus of no help to the [Plaintiff] unless, of course, they can show that the Department's statutory violation injured them."

  Owner-Operator Indep. Drivers Ass'n, Inc. v. United States Dep't of Transportation, 879 F.3d 339, 344 (D.C. Cir. 2018).

- "[A] statutory violation *alone* does not create a concrete informational injury sufficient to support standing. Rather, a constitutionally cognizable informational injury requires that a person lack access to information to which he is legally entitled *and* that the denial of that information creates a 'real' harm with an adverse effect.

  Dreher v. Experian Info. Sols., Inc., 856 F.3d 337, 345 (4th Cir. 2017) (citation omitted).

27

The Scope of the statute determines the types of injuries that Congress sought to prevent.

- Statutes like the Federal Elections Campaign Act, the Federal Advisory Committee Act, and FOIA are primarily designed to provide the public with information. Denial of information under these statutes generally creates a cause of action.

  CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff, v. DAVID BERNHARDT, et al., Defendants., No. 18-2576 (RC), 2020 WL 709635, at *7 (D.D.C. Feb. 12, 2020)

- While the Endangered Species Act is primarily designed to conserve species. Therefore, the plaintiff must show something more than a mere setback to his or her interests. The lack of information must actually harm the plaintiff, such as limiting its ability to educate the public.

  Id. at 8.

28

Aesthetic injuries.

- "The desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for the purpose of standing."

  Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res. 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561(1992))

- Aesthetic injuries, by definition, relate to the senses.

  New England Anti-Vivisection Soc'y v. United States Fish & Wildlife Serv., 208 F. Supp. 3d 142, 170 (D.D.C. 2016); *Citizens Coordinating Comm. on Friendship Heights, Inc. v. Wash. Metro. Transit Auth.*, 765 F.2d 1169, 1173 (D.C. Cir. 1985).

- The defendant's actions must interfere with the plaintiff's ability "to use or observe an animal species."

  Sierra Club v. Jewell, 764 F.3d 1, 5 (D.C. Cir. 2014); *see also Am. Soc'y For Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 337 (D.C. Cir. 2003).

29

Spokeo has not changed aesthetic-injury jurisprudence, yet.

- In light *of Spokeo,* the Fourth Circuit found that the plaintiff alleged a valid aesthetic injury in observing grizzly bears at a zoo in conditions that don't violate the Endangered Species Act.

  Hill v. Coggins, 867 F.3d 499, 506 (4th Cir. 2017).

30

Courts are applying the test more vigorously.

- "In this case, the injuries in fact asserted by Petitioners' members depend on at least four conditions:
  1. Discharge: Operators in the Gulf discharge pollutants, as authorized by the permit.
  2. Geographic Nexus: The discharges reach areas of the Gulf in which Petitioners' members have interests.
  3. Temporal Nexus: The discharges are present at a time relevant to Petitioners' members' interests.
  4. Adverse Effect: The discharges negatively affect Petitioners' members' interests."

  Ctr. for Biological Diversity v. United States Envtl. Prot. Agency, 937 F.3d 533, 537 (5th Cir. 2019)

31

Continued.

- Plaintiffs alleged an aesthetic injury in viewing Florida bonneted bats in the Big Cypress National Preserve to get standing to challenge the Park Services actions under NEPA, the APA, and the ESA.

  Nat. Res. Def. Council v. Nat'l Park Serv., 250 F. Supp. 3d 1260 (M.D. Fla. 2017).
- But they did "not demonstrate … that the … purported interest in the Florida bonneted bat will be imminently injured due to any of the agency's actions in this case."

  Id. at 1309.
- Accordingly, the court found that there was no concrete harm in the case.

  Id. at 1309-10.

32

Animals as parties

33

This theory gives animals and their advocates more access to the courts.

- "In the words of Justice William Douglas, granting nature access to court[s] is the only way '[t]here will be assurances that all of the forms of life which [nature] represents will stand before the court—the pileated woodpecker as well as the coyote and bear, the lemming as well as the trout in the streams.'"

  Hope M. Babcock, *A Brook with Legal Rights: The Rights of Nature in Court*, 43 Ecology L.Q. 1, 21 (2016) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 752 (1972) (Douglas, J., dissenting)).

- It's seen as a way around standing.

34

Historical precedent.

- This dates back to early 9th Century Italy.

  Jen Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals*, 9 Animal L. 97, 100 (2003).

- It happened in the U.S. as recently as 1924, when the Governor of PA prosecuted Pep, a Labrador retriever, for killing the governor's cat. Pep was convicted and sentenced to life in prison, where he eventually died of old age.

  Id. 122.

35

Ecclesiastical and secular trials.

- Wild animals were subjected to ecclesiastical hearings. The thought was that only the supernatural powers of god could be used to control them.

  Id. at 101.

- The animals never showed up for the hearing and were usually convicted in absentia.

  Id. at 102.

- Domestic animals that were subject to human control were tried in secular courts. These charges were generally levied against an induvial animal as opposed to a whole group.

  Id. at 109.

36

The Ninth Circuit once supported this concept.

- "As an endangered species ... the bird ... also has legal status and wings its way into federal court as a plaintiff in its own right." "The Palila (which has earned the right to be capitalized since it is a party to this proceeding) is represented by attorneys for the Sierra Club . . . ."

Palila v. Hawaii Dep't of Land & Nat. Res., 852 F.2d 1106, 107 (9th Cir. 1988).

37

Courts in the Ninth Circuit did not always treat it as binding precedent.

- The "'Alala is not a 'person' within the meaning of the ESA and . . . Federal Rule of Civil Procedure 17(c), the rule plaintiffs cite as authority for the 'Alala's appearance as a party in this action, speaks only to infants and incompetent persons, not birds."

Hawaiian Crow ('Alala) v. Lujan, 906 F. Supp. 549, 551 (D. Haw. 1991).

38

The Ninth Circuit has since backed off.

- The statements in *Palila* "were certainly not intended to be a statement of law, binding on future panels, that animals have standing to bring suit in their own name under the ESA."

  Cetacean Cmty. v. Bush, 386 F.3d 1169, 1174 (9th Cir. 2004).

- "If Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly."

  Id. at 1179.

39

Naming animals as parties has been done several times, mainly in the Ninth Circuit, but rarely addressed.

- *Naruto v. Slater*, No. 15-CV-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016); *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, Inc.*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012); *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 126 F.3d 461 (3d Cir. 1997); *Marbled Murrelet (Brachyramphus Marmoratus) v. Pac. Lumber Co.*, 880 F. Supp. 1343 (N.D. Cal. 1995), *aff'd sub nom*. 83 F.3d 1060 (9th Cir. 1996); *Loggerhead Turtle v. Cty. Council of Volusia Cty., Fla.*, 896 F. Supp. 1170 (M.D. Fla. 1995); *Mt. Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir. 1991); *Northern Spotted Owl v. Lujan*, 758 F.Supp. 621 (W.D. Wash. 1991); *Northern Spotted Owl v. Hodel*, 716 F.Supp. 479 (W.D. Wash. 1988).

40

Legal-personhood status

41

What is legal personhood?

- "Legal personhood describes an entity with the capacity for legal rights."

  Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. Envtl. Aff. L. Rev. 471, 472 (1996).

42

Animals are generally viewed as property.

- "Dogs [are] personal property … not [classified] as persons."

  Petco Animal Supplies, Inc. v. Schuster, 144 S.W.3d 554, 561 (Tex. App. 2004); *Griffin v. Fancher*, 127 Conn. 686, 687–88, 20 A.2d 95, 96 (Conn. 1941).

- "[T]he wildlife within the borders of a state are owned by the state in its sovereign capacity for the common benefit of all its people."

  O'Brien v. State, 711 P.2d 1144, 1148–49 (Wyo. 1986); *Pullen v. Ulmer*, 923 P.2d 54, 60 (Alaska 1996) ("the public trust responsibilities … compel the conclusion that fish occurring in their natural state are property of the state").

43

How do animal-rights lawyers want to obtain legal-person hood status?

- They don't have a focused strategy, just several different ideas and theories.
- Many mammals, such as primates that are similar to humans neurologically and genetically, share emotive and cognitive characteristics with humans.

  Thomas G. Kelch, *Toward A Non-Property Status for Animals*, 6 N.Y.U. Envtl. L.J. 531, 539 (1998).

- Granting personhood based on the intelligence of the species. (This is not the favored approach because it means that some animals will necessarily lack the intelligence to obtain personhood status.)

  Richard L. Cupp Jr., *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood As Stepping Stones Toward Abolishing Animals' Property Status*, 60 SMU L. Rev. 3 (2007).

44

Continued.

- Granting personhood where an animal has human cells within it.

  See D. Scott Bennett, *Chimera and the Continuum of Humanity: Erasing the Line of Constitutional Personhood*, 55 Emory L.J. 347, 348 (2006).

- Creating new property laws where property with a distinction between living and non-living property.

  David Favre, *Equitable Self-Ownership for Animals*, 50 Duke L.J. 473, 473 (2000).

45

The Nonhuman Rights Project's (NhRP) litigation.

- Steven Wise, of the Nonhuman Rights Project, files lawsuits asking courts for declaratory judgment that nonhuman animals have a legal right as a person.

  Steven M. Wise, *Legal Personhood and the Nonhuman Rights Project*, 17 Animal L. 1, 11 (2010).

- His objective is "to change the common law status of great apes, elephants, dolphins, and whales from mere 'things,' which lack the capacity to possess any legal right, to 'legal persons,' who possess such fundamental rights as bodily liberty and bodily integrity."

  https://www.nonhumanrights.org/who-we-are/.

46

Tommy the Chimp.

- NhRP sought writ of habeas corpus, arguing that Tommy the chimp was a "person" being held against his will, but did not challenge the conditions of the facility.

People ex rel. NhRP, Inc. v. Lavery, 124 A.D.3d 148, 149 (N.Y. App. Div. 2014).

- "[A]nimals have never been considered persons for the purposes of habeas corpus relief, nor have they been explicitly considered as persons or entities capable of asserting rights for the purpose of state or federal law."

Id. at 150 (collecting authorities).

- "[T]he ascription of rights has historically been connected with the imposition of societal obligations and duties": the "social contract." "Case law has always recognized the correlative rights and duties that attach to legal personhood."

Id. at 151-152.

- "[C]himpanzees cannot bear any legal duties"; they aren't people.

Id.

47

Jane Goodall on chimps.

- "Often when I woke in the night, horrific pictures sprang unbidden to my mind—Satan, cupping his hand below Sniff's chin to drink the blood that welled from a great wound on his face; old Rodolf, usually so benign, standing upright to hurl a four-pound rock at Godi's prostrate body; Jomeo tearing a strip of skin from De's thigh; Figan charging and hitting, again and again, the stricken, quivering body of goliath…. And perhaps worst of all, Passion forging on the flesh of Gilka's baby, her mouth smeared with blood like some grotesque vampire from the legends of Childhood."

Jane Goodall, *Through a Window: My thirty years with Chimpanzees of Gombe* 127 (2010 ed.).

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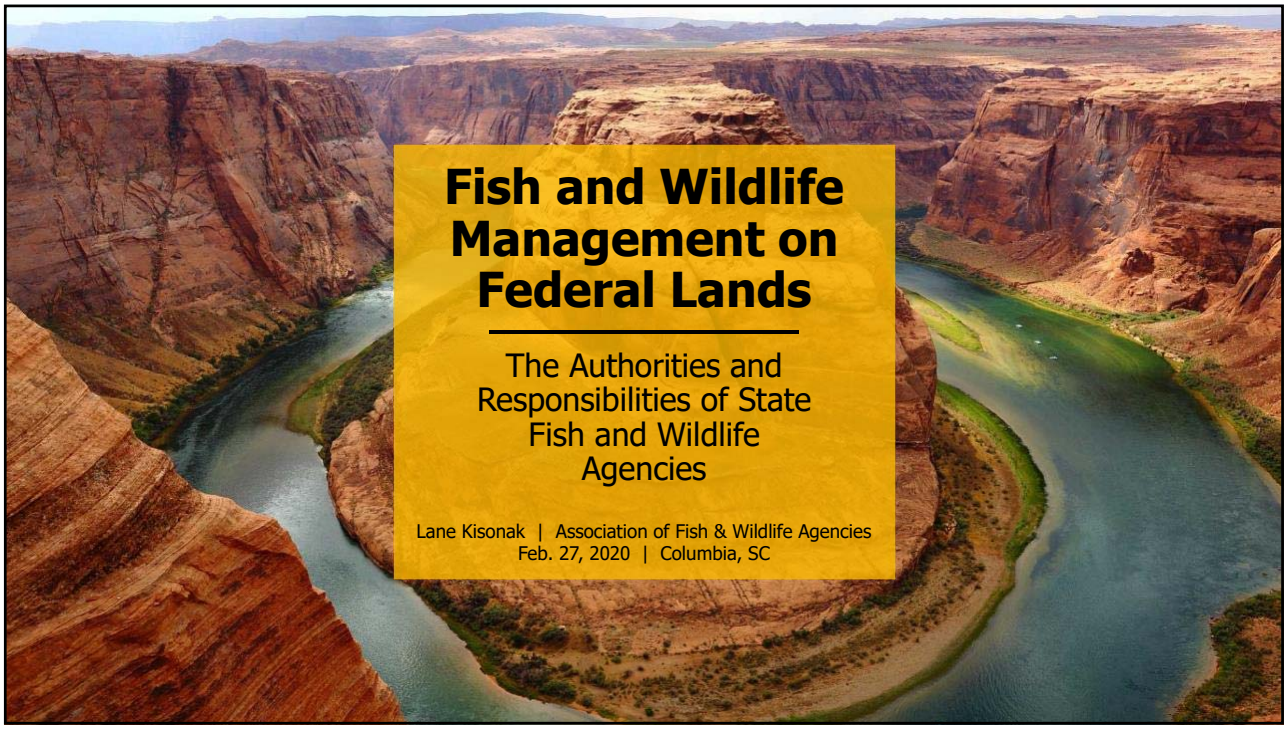
Chimpanzees regularly fight wars.

South Carolina Bar
Continuing Legal Education Division

The State's Role in Managing Wildlife on Federal Lands

Lane Kisonak



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State and federal wildlife management
Thinking inside and outside the law

- **The public trust doctrine** — There are a lot of public trust doctrines.
- **The North American Model** — The Model is not exactly law…but things change.
- **The U.S. Constitution** — Somehow, the most straightforward body of law I'll be talking about today.
- **Savings clauses** — What are they worth?
- **Plain old language** — "Management" "Conservation" "Collaboration" "Anthropomorphization" "Relevancy"



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Roadmap

1. **State Ownership and Management of Wildlife**
   a) The rise of sovereign ownership
   b) The evolution of the public trust doctrine(s)
   c) The North American Model
2. **Constitutional Questions**
   a) Impacts from the Commerce and Supremacy Clauses on wildlife management
   b) Understanding the Property Clause and self-executing authorities
   c) Parens patriae, police powers, and state interests in resource management
3. **Unresolved Jurisdictional Issues and Ongoing Disputes on Federal Lands**
   a) Savings clauses (refuges, wilderness areas…)
   b) Refuge purposes, planning, and compatibility
   c) Reducing interagency conflict and confusion
4. **Constructive Collaboration**
   a) Regularly updating policy, guidance, and MOUs
   b) Securing higher funding for state and federal conservation

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STATE **OWNERSHIP** AND **MANAGEMENT** of WILDLIFE

The rise of sovereign ownership

- **Federalist 10 (Madison):** "[T]he greater the number of citizens and extent of territory which may be brought within the compass of republican…government…[the greater the] variety of parties and interests" available to protect the "rights of other citizens" and "control[] the effects of faction."
  - How does this apply to natural resources and land use?
- **Property Clause (Art. IV, sec. 3, cl. 2):** "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States…"
  - **BUT:**
    - Savings clauses
    - State and federal case law

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STATE **OWNERSHIP** AND **MANAGEMENT** of WILDLIFE

The rise of sovereign ownership

- Government ownership of land can be **proprietary** (exclusion of trespassers, conveyance of interests) or **sovereign** (regulation, taxation)
- Initial emergence of the **public trust doctrine**:
  - ***Arnold v. Mundy* (1821):** "[T]he sea, the fish and the wild beasts" lay "in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit."
  - ***Martin v. Waddell's Lessee* (1842):** People retain the right to fish in a state's navigable and tidal waters subject to state ownership of waterbeds. States may only transfer ownership interests in PT resources for the common good.
  - ***Illinois Central Railroad Co. v. Illinois* (1892):** A state may not "substantial[ly] impair" land for the PT under navigable waters when disposing of it.

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STATE **OWNERSHIP** AND **MANAGEMENT** of WILDLIFE

The evolution of the public trust doctrine

- Application of the public trust doctrine to **wildlife**:
  - ***Geer v. Connecticut* (1896):** "[P]ower or control [over wildlife] lodged in the State, resulting from…common ownership, is to be exercised…as a trust for the benefit of the people." It falls within the "police power of the state" to "make such laws as will best preserve such game [and fish], and secure its beneficial use in the future to the citizens."
- What about the **Commerce Clause?**
  - *Geer* rejected hunting and sale of game within the state as subject to the Clause, **but:**

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STATE **OWNERSHIP** AND **MANAGEMENT** of WILDLIFE

The evolution of the public trust doctrine

- ***Missouri v. Holland* (1920):** The Supreme Court upholds the Migratory Bird Treaty Act (1918) against a lawsuit claiming that the federal government could not negotiate the treaty because states traditionally regulate the taking of wildlife.
- ***Hughes v. Oklahoma* (1979):** The Supreme Court declares *Geer* dead after applying the Dormant Commerce Clause to strike down an OK statute banning the transport of minnows out of state.

> The fiction of state ownership may no longer be used to force those outside the State to bear the full costs of "conserving" the wild animals within its borders when equally effective nondiscriminatory conservation measures are available…Today's decision makes clear, however, that States may promote this legitimate purpose only in ways consistent with the basic principle that "our economic unit is the Nation"…and that when a wild animal "becomes an article of commerce…its use cannot be limited to the citizens of one State to the exclusion of citizens of another State.

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STATE **OWNERSHIP** AND **MANAGEMENT** of WILDLIFE

The evolution of the public trust doctrine

- **When** does an animal become an "article of commerce"?
- **What** is a limitation on the use of wildlife to the citizens of one state?
- **What** is use?

- Is **ownership** the name of the game anymore?
- Where is the dividing line between state and federal authority if ownership is ambiguous?
- How relevant are ***Geer***, ***Arnold***, and ***Illinois Central Railroad***?

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STATE **OWNERSHIP** AND **MANAGEMENT** of WILDLIFE

The evolution of the public trust doctrine

- What is the **modern public trust doctrine?**
  - A means of holding government agencies accountable for natural resource decisions
  - A state's authority and duty to protect natural resources and ensure their continued use by the public as a fiduciary
- How many PTDs are there? What **resources** are protected by these PTDs?
  - State parks
  - Fish habitats
  - Fossil beds
  - Marine life
  - Beaches
  - Non-navigable streams

But only in certain states!

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STATE **OWNERSHIP** AND **MANAGEMENT** of WILDLIFE

The evolution of the public trust doctrine

- ***Ctr. for Biological Diversity v. FPL Grp, Inc.* (2008):** CA court holds that the PTD requires state agencies to protect **wildlife resources** and the public can enforce that trust against the state as long as the **proper agencies** are brought before the court.
  - State courts in AK, LA, VA have recognized the wildlife trust in civil claims.
  - **In re Steuart Transp. Co. (1980):** VA federal court affirmed state PTD in wildlife by holding that VA and the federal government could recover damages for 30,000 migratory waterfowl deaths from an oil spill. VA does not "own" the wildlife but has a duty to protect the public's interest in those resources.
- **What is the proper agency?**
  - Jurisdictional shifts between wildlife agencies and agricultural agencies (plants, CWD)

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STATE **OWNERSHIP** AND **MANAGEMENT** of WILDLIFE

The North American Model of Wildlife Conservation

- **Seven tenets:**
  1. Wildlife resources are conserved and held in trust for all citizens.
  2. Commerce in dead wildlife is eliminated.
  3. Wildlife is allocated according to democratic rule of law.
  4. Wildlife may only be killed for a legitimate, non-frivolous purpose.
  5. Wildlife is an international resource.
  6. Every person has an equal opportunity under the law to participate in hunting and fishing.
  7. Scientific management is the proper means for wildlife conservation.
- The Model is **descriptive** and **historical**, with **normative** elements, a conduit between governance and conservation.

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STATE **OWNERSHIP** AND **MANAGEMENT** of WILDLIFE

The North American Model of Wildlife Conservation

- **Critiques** of the Model:
  - Overly focused on hunting and fishing
  - Omissive of federal lands and environmental laws
- **Adaptive capacity** of the Model:
  - Flexible, adaptable to state-specific contexts and changing circumstances
  - Useful for conducting gap analyses

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CONSTITUTIONAL QUESTIONS

Impacts from the Commerce and Supremacy Clauses on wildlife management

- Federal wildlife conservation statutes reshaped the field over the 20th century, based on the Commerce Clause (MBTA, ESA), but left much primary responsibility to the states.
  - Federal Aid in Wildlife Restoration ("Pittman-Robertson") Act (1937)
  - Federal Aid in Sport Fish Restoration ("Dingell-Johnson") Act (1950)
- **Core ideas:**
  - Federal authority is not self-executing.
  - Is Congress's preemptive intent clearly expressed?
  - What authority does Congress reserve to state agencies?

Missouri v. Holland → PR-DJ → NEPA, ESA, FLPMA, NFMA, etc. → present day

Substantial effects doctrine
Attenuation of 10th Amend.

Anti-commandeering doctrine
Clear statement rules

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CONSTITUTIONAL QUESTIONS

Impacts from the Commerce and Supremacy Clauses on wildlife management

- ***Gregory v. Ashcroft* (1991):** SCOTUS holds that preemption in traditionally state-regulated areas is "extraordinary…in a federalist system" and must be "exercise[d] lightly." The "more sovereign" the state law, the "more deferential" to state interests a preemption analysis should be.
- **Anti-commandeering doctrine:** Prohibits the federal government from requiring states to use their sovereign authorities to implement federal law (see ***New York v. U.S.***, ***Printz v. U.S.***), but still allows the federal government to regulate state activities if such regulation does not "seek[] to control or influence the manner in which States regulate private parties." (***Reno v. Condon***)
  - **How does this apply to wildlife management?**
    - 1st Cir.: A state agency can violate the ESA by authorizing a third party to take members of a listed species.
    - 5th Cir.: Declined to apply anti-commandeering doctrine to alleged ESA violation by state environmental agency's water licensing resulting in habitat modification (no proximate cause).

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CONSTITUTIONAL QUESTIONS

Understanding the Property Clause and self-executing authorities

- What do statutes and cases have to say about regulating **on state land near or within federal land**?
- What about competing objectives of federal agencies affecting a single species or population?

- ***Hunt v. U.S.*** **(1928) &** ***Kleppe v. New Mexico*** **(1976):** Property Clause power extends to resource activities that damage federal land or wildlife "integral" to federal land
- ***Gibbs v. Babbitt*** **(2000):** Property Clause allows FWS to regulate the taking of endangered species on private property – but what about non-ESA-listed species?
- ***Camfield v. U.S.*** **(1897):** Property Clause allows for regulation of private land use affecting federal land – but what about regulation of state land?

- Aside from regulation of persons directly…express cession of jurisdiction by states…regulation of activity on private land…**states largely retain jurisdiction** over natural resources on or near federal lands.

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CONSTITUTIONAL QUESTIONS

Understanding the Property Clause and self-executing authorities

- ***Defenders of Wildlife v. Andrus*** **(1980):** D.C. Circuit holds that DOI did not need to go through NEPA process to decline halting AK's wolf-culling on federal land because FLPMA "explicitly reaffirms" traditional state authority over wildlife management.

- ***Utah Native Plant Soc'y v. USFS*** **(2019):** 10th Circuit holds that state agencies "retain[] a measure of sovereignty over wildlife management within the national forest [system]…absent federal law to the contrary."

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CONSTITUTIONAL QUESTIONS

Parens patriae, police powers, and state interests in resource management

- ***Parens patriae*, Black's Law Dictionary (2004): "A doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen"**
  - **Quasi-sovereign interests:** A direct and independent interest of the state – health, safety, general welfare…proprietary interests? Sovereign ownership?
    - Taxes on wildlife products…regulation and control of wildlife…not just licensing.
- ***Massachusetts v. EPA* (2007):** SCOTUS gives MA's claims against the federal government—seeking regulation of GHGs as air pollutants upon an endangerment finding—"special solicitude"
- ***Maine v. M/V Tamano* (1973):** District court awards recovery for oil spill damages to marine life

Parens patriae — ? — Police powers

It depends

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CONSTITUTIONAL QUESTIONS

Parens patriae, police powers, and state interests in resource management

- ***State v. Cline* (1958):** OK court recognizes federal intent to reserve with OK its civil and criminal jurisdiction over a game reserve within the Wichita National Forest; "It appears it was the intention of the United States to assert less than exclusive jurisdiction over the area in question." Federal code was "designed to prevent trespass on refuge lands but…not intended to interfere with the operation of local game laws."
  - Then came the National Wildlife Refuge System (1966) and Improvement Act (1997).
    - **What does the Constitution leave for state management of non-ESA and non-MBTA species on federal property?**

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UNRESOLVED **JURISDICTIONAL** ISSUES AND ONGOING DISPUTES ON **FEDERAL LANDS**

Savings clauses: National Wildlife Refuge System

- **National Wildlife Refuge System Administration Act (1966)** and **Improvement Act (1997):** Provide for wildlife and ecosystem conservation, and permit the use of refuges subject to system and unit purposes and compatibility determinations
  - A **national network of lands and waters** for **conservation, management, and restoration** of fish and wildlife

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UNRESOLVED **JURISDICTIONAL** ISSUES AND ONGOING DISPUTES ON **FEDERAL LANDS**

Refuge purposes, planning, and compatibility

- **"Conservation"** and **"management"** are treated synonymously as activities meant to sustain, restore, and enhance healthy populations using **modern scientific programs and resources**
  - Adaptive management and compatible uses **("the Big Six")**
    - Wildlife-oriented recreation and environmental education
    - Regulated taking—hunting, trapping, and fishing
    - Individual refuge purposes
    - Managers give weight to state activities, incl. state regulation of wildlife-dependent uses
      - Predator-prey management
      - Use of motorized vehicles and aircraft for research
- **Guidance:** BIDEH, secretarial orders, harmonization initiatives…

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UNRESOLVED **JURISDICTIONAL** ISSUES AND ONGOING DISPUTES ON **FEDERAL LANDS**

Savings clauses: National Wildlife Refuge System

- **NWRSIA savings clauses:**
  - "Nothing in this Act shall be construed to authorize the Secretary [of the Interior] to control or regulate hunting or fishing of fish and resident wildlife on land or waters that are not within the [Refuge] System."
  - "Nothing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System. Regulations permitting hunting or fishing of fish and resident wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws, regulations, and management plans."

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UNRESOLVED **JURISDICTIONAL** ISSUES AND ONGOING DISPUTES ON **FEDERAL LANDS**

Savings clauses: National Wildlife Refuge System

- ***Wyoming v. U.S.*** **(2002):** 10th Circuit holds:
  a) Congress cannot be read to have preempted state authority unless it stated its "clear and manifest" intent.
  b) Courts must give full effect to savings clauses where doing so does not upset the federal scheme.
  c) Unlike in maritime law, there has not been a manifest federal interest in regulating wildlife since the beginning of the Republic; wildlife management is a field "traditionally occupied" by States.
  d) Congress did not intend to displace state management where it "bears directly upon the well-being of state interests arising outside those public lands."

  BUT:

  e) It was "highly unlikely" that Congress granted authority to FWS to manage a refuge and nullified that grant with a savings clause.

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UNRESOLVED **JURISDICTIONAL** ISSUES AND ONGOING DISPUTES ON **FEDERAL LANDS**

Savings clauses: National Wildlife Refuge System

- Turning back the clock:
  - ***SWANCC v. Army Corps of Engineers* (2001):** SCOTUS reads CWA sections 101(b) and 404(a) to stop short of covering abandoned sand and gravel pits as intrastate navigable waters providing habitat for migratory birds
- But not all savings clauses are alike.
  - **Multiple Use-Sustained Yield Act (MUSYA):** "Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests."
  - **Federal Land Policy & Management Act (FLPMA):** "[N]othing in this Act shall be construed as authorizing the Secretary concerned to require Federal permits to hunt and fish on public lands or on lands in the National Forest System and adjacent waters or as enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife. However, the Secretary concerned may designate areas of public land and of lands in the National Forest System where, and establish periods when, no hunting or fishing will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law."

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UNRESOLVED **JURISDICTIONAL** ISSUES AND ONGOING DISPUTES ON **FEDERAL LANDS**

Savings clauses: Wilderness

- **Wilderness Act:** "**[U]ntrammeled by man**, where man himself is a visitor who does not remain"
  1. Unmarked by humans
  2. Conducive to solitude and primitive recreation
  3. Large enough to preserve and use unimpaired
  4. Comprising features of scientific, educational, scenic, or historical value
- **Within** and **supplemental** to forests, parks, refuges, public lands
- Managed by the department / bureau with jurisdiction over the designated land

- **Savings clause:** "Nothing in this chapter shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests."
  - FLPMA extends this to BLM wildernesses
  - Similar language included in **at least 31** wilderness statutes since 1978

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UNRESOLVED **JURISDICTIONAL** ISSUES AND ONGOING DISPUTES ON **FEDERAL LANDS**

Savings clauses: FLPMA

- **FLPMA (BLM and Forest lands):**
  - "[N]othing in this Act shall be construed as authorizing the Secretary concerned to require Federal permits to hunt and fish on public lands or on lands in the National Forest System…or as enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife."
- **BLM bureau-wide wildlife and fisheries policy:**
  - "Except [for marine mammals, migratory birds, and ESA-listed species], the responsibility for managing…wildlife itself traditionally rests with the individual States."
  - States set seasons, bag limits, and license fees for game birds, mammals, and fish, and conduct on-the-ground management and research for game and imperiled non-game wildlife.

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UNRESOLVED **JURISDICTIONAL** ISSUES AND ONGOING DISPUTES ON **FEDERAL LANDS**

NEPA

- **NEPA:**
  - ***Fund for Animals v. Clark* (1998):** D.C. district court holds that Wyoming normally need not undergo NEPA procedure when making wildlife management decisions, but collaboration with the Park Service, USFWS, and USFS in bison management plan subjected it to NEPA (federal agencies were closely connected with the plan)
  - ***Fund for Animals v. Hall* (2011):** D.C. district court upholds expansion of hunting on 70 National Wildlife Refuges as adequate under NEPA (FONSI was not arbitrary and capricious)

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UNRESOLVED **JURISDICTIONAL** ISSUES AND ONGOING DISPUTES ON **FEDERAL LANDS**

Reducing interagency conflict and confusion

- **Cooperative management** is increasingly recognized as key to managing issues like:
  - Anthropogenic climate change
  - Invasive species
  - Wildfires
  - Diseases
  - Pollution
  - Extreme weather events
- Regional offices are receptive to state priorities and foster interagency collaboration.
  - Federal biologists on state-led technical committees
  - State biologists participating in federal lands planning
- **State Wildlife Action Plans (SWAPs):** 10-year plans adopted by state FWAs to identify and detail management strategies for 12,000 state-managed species of greatest conservation need (SGCN)

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UNRESOLVED **JURISDICTIONAL** ISSUES AND ONGOING DISPUTES ON **FEDERAL LANDS**

Reducing interagency conflict and confusion

- **On one hand:**
  - ***Chevron* for states?**
    - A growing number of cases suggest that *Chevron* and *Skidmore* deference might be applicable to state readings of statutes (where ambiguous) and agency rules where state participation is based on federal funding conditions
- **On the other hand:**
  - **What happens if courts adversely read the law?**
    - 2007 study: Congress almost never acts to override Supreme Court decisions on statutory preemption even if a legislative majority disagrees with the judicial outcome

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CONSTRUCTIVE **COLLABORATION**

Regularly updating policy, guidance, and MOUs; creating new tools

- State fish and wildlife agencies are responding to biodiversity losses and other economic, political, and legal challenges with:
  - Research projects (relevancy, outdoor values, R3)
  - Memoranda of understanding
  - Increased, permanent, and more varied funding sources
    - State taxes on outdoor goods
    - Federal funding authorizations

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CONSTRUCTIVE **COLLABORATION**

Regularly updating policy, guidance, and MOUs; creating new tools

- **TOGAs:**
  - Translocal
  - Organizations
  - of
  - Government
  - Actors
- **FACA & UMRA:**
  - Intergovernmental communications are exempt from requirements to provide public notice of certain meetings and associated documents
- ***Wyoming Sawmills, Inc. v. USFS* (2001):** District court holds that consultations between USFS and state, county, and tribal representatives fell within UMRA exceptions to FACA and "fulfill[ed] the Forest Service's obligation under [federal statute] to consult with the other Federal, State, and local agencies and Indian tribes…"

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CONSTRUCTIVE **COLLABORATION**

Regularly updating policy, guidance, and MOUs; creating new tools

- **MOUs, statutory ambiguity, and conflict resolution**
  - ***Wyoming v. U.S.*** faulted the state and federal agencies for failing to "find any common ground on which to commence fruitful negotiations"
  - In the modern legislative era, environmental statutes are rarely updated.
  - MOUs between agencies are largely targeted by subjects or projects of finite duration.

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CONSTRUCTIVE **COLLABORATION**

Regularly updating policy, guidance, and MOUs; creating new tools

- **The North American Model:**
  - Every application of the Model, each policy decision, and every management action affects the Model's present-day meaning.
- **Organ et al. (2019):**
  - "Confusion continues to exist over the intent of the Model and its application. Today, most of the constructs are being applied to a wide array of both hunted and non-hunted taxa, such as ownership of wildlife, wildlife markets, legal allocation, legitimate purpose, international resource and science. However, the actual application is not consistent. The reason is not the Model itself, but rather resources and advocacy[.]"

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CONSTRUCTIVE **COLLABORATION**

Securing higher funding for state and federal conservation

- **Imperiled species recovery:**
  - Recent study: ¼ of T/E species lack final recovery plans; other species' plans are often outdated
  - National Listing Workplan (2016):
    - 5 **prioritization bins** for status reviews and 12-month findings
    - Originated from SEAFWA At-Risk Species Program (SEARS), and FWS-SEAFWA partnership
      - Long-term
      - Forward-thinking
      - Regionally-based
      - State-federal Collaboration

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CONSTRUCTIVE **COLLABORATION**

Securing higher funding for state and federal conservation

- **Recovering America's Wildlife Act, H.R. 3742 (2019):**
  - Provides states, territories with $1.3 billion per year for SGCN and T/E species (plus $97.5 million for tribes)
    - Provides capacity for SWAP implementation incl. SGCN, plant and habitat community types
    - At least 10% for T/E species
    - 10% for competitive innovation grant program (techniques, tools, strategies, collaborations for species recovery)
    - Law enforcement activities directly related to SGCN
  - Tribal activities: Wildlife conservation and restoration programs for tribal SGCN, habitats, T/E species, invasive species, law enforcement

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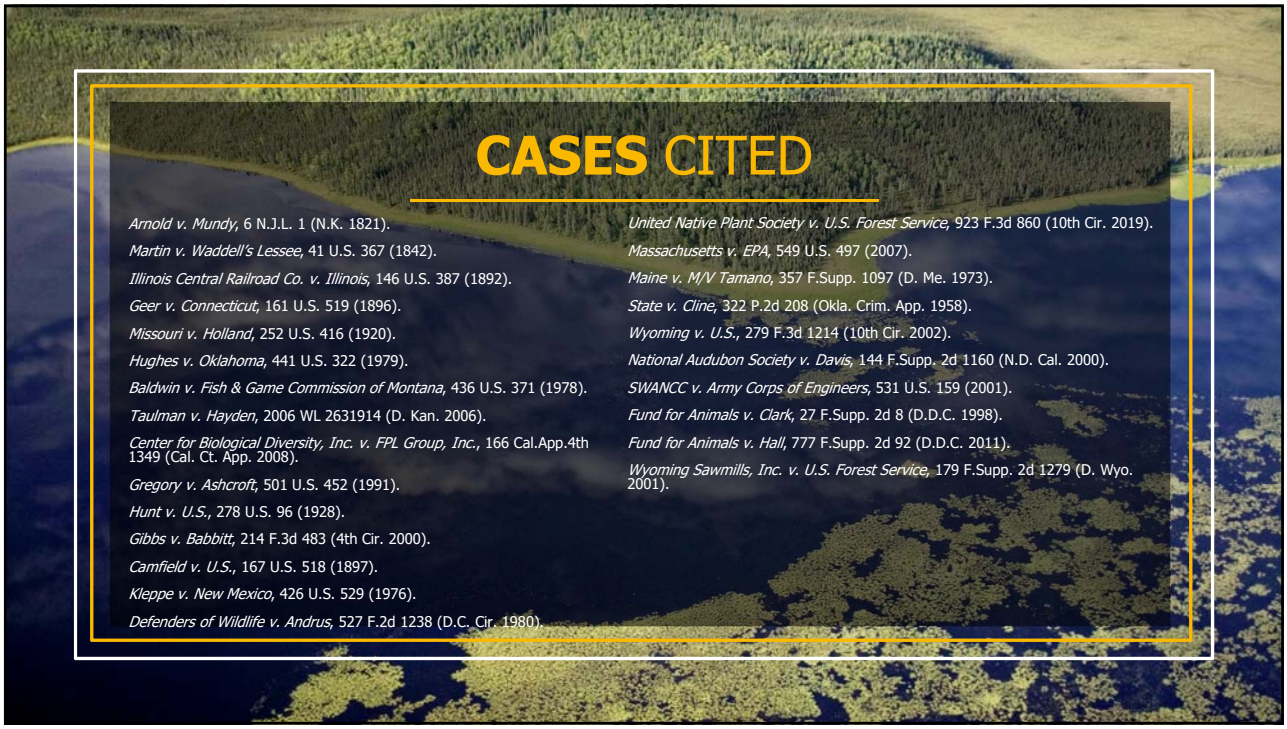
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South Carolina Bar

Continuing Legal Education Division

Federal Protection for Species

Parks Gilbert

Federal Authority for Fish and Wildlife Conservation

Parks Gilbert, Attorney
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1

Goals of Presentation

- Impart a very general understanding of federal responsibilities and authority over fish and wildlife resources
  - Statutes directly regulating fish and wildlife resources
- Impart a very general awareness of potential risk to clients from impacts to fish and wildlife resources under federal law
- Caveats
  - Intent is to cover the high points and most well-known statutes
  - Cannot cover the topics in the presentation in much detail

2

Criteria: Federal Land or Specifically Protected

- If a species of fish or wildlife is on federal land, some protections may apply to that species.
- If a species is specifically listed, such as a migratory bird, threatened or endangered species, an eagle, or a marine mammal, certain protections will apply to that species.

3

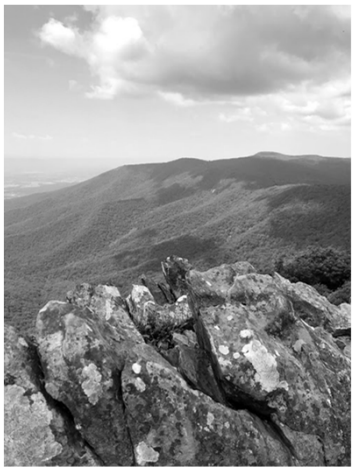
Federal Agencies with Significant Fish and Wildlife Portfolios

- Department of Agriculture
  - Forest Service
- Department of Commerce, National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS)
- Department of Defense
  - Army Corps of Engineers and military bases
- Department of the Interior
  - Bureau of Land Management
  - Bureau of Reclamation
  - Fish and Wildlife Service (FWS)
  - National Park Service
- Public power marketing agencies, e.g., Bonneville Power

4

Some Types of Federal Land/Properties

- Military bases, etc. (DOD)
- National Forests (USFS)
- National Monuments (NPS, BLM, USFS, NMFS, FWS)
- National Parks (NPS)
- National Preserves (NPS)
- National Recreation Areas (NPS, USFS, BLM)
- Water projects (U.S. ACOE, Bureau of Reclamation, power marketing agencies)
- Wilderness (USFS, NPS, BLM, FWS)
- Wildlife Refuges (FWS)
- Other federal lands (BLM)



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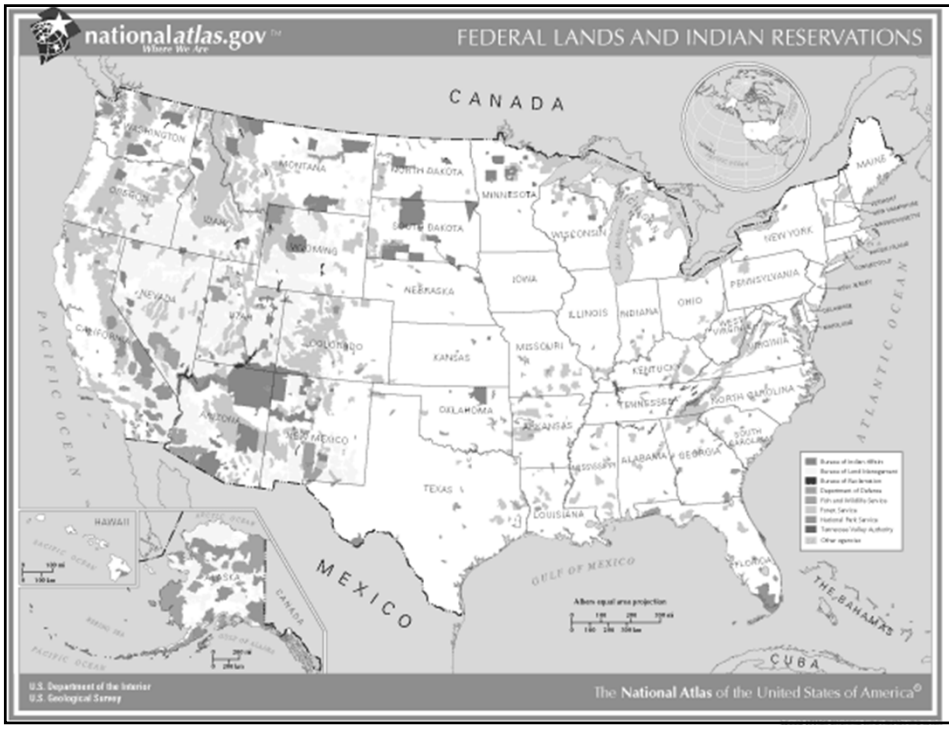

Federal Land in the U.S.

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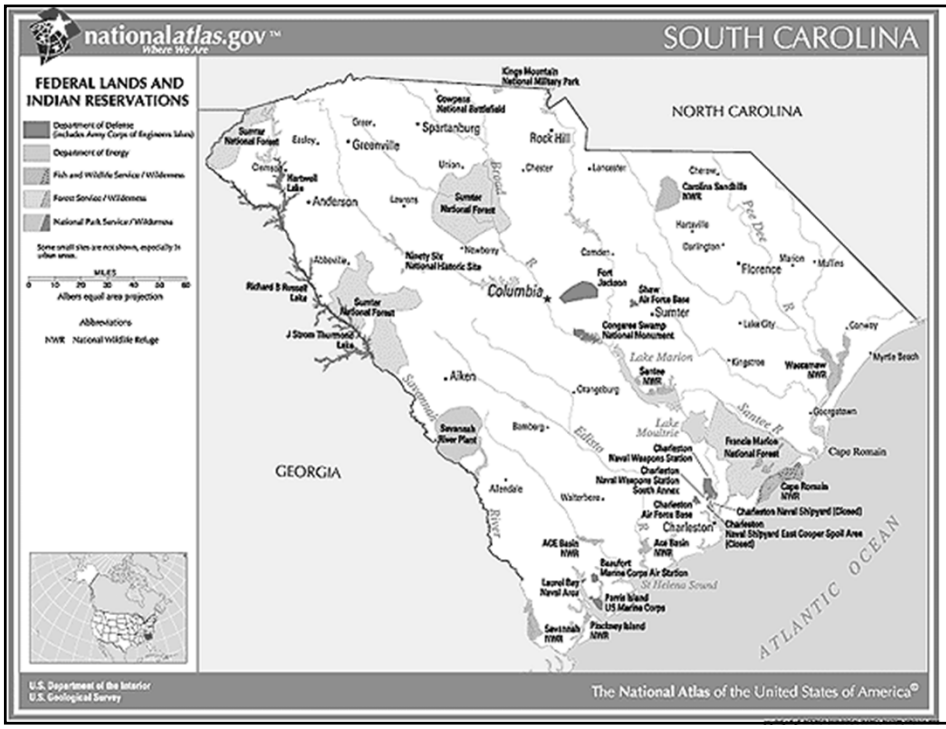

Federal Land in South Carolina

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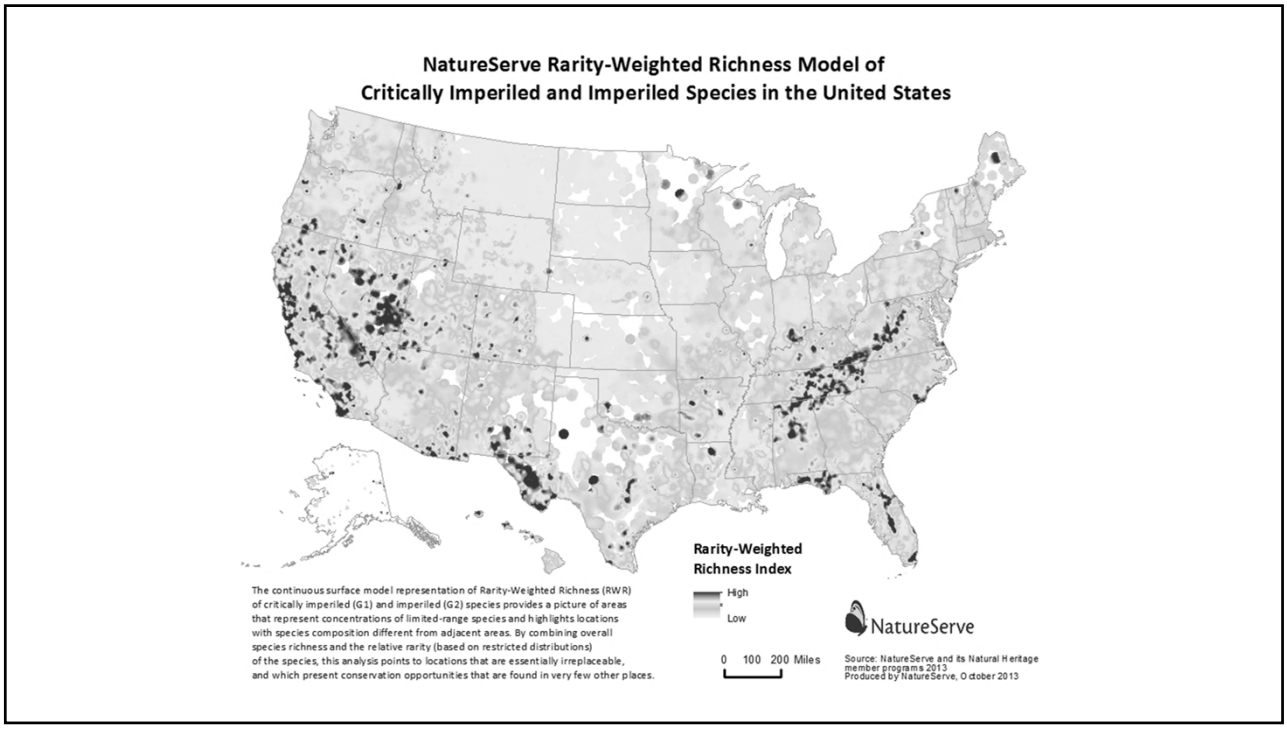

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General Duties for F&W Conservation: Land and Water Resource Managing Agencies

- Generally, duties stem from land ownership and related management, or operations of federal dams, water resource projects, etc., which all impact F&W
- Duties set by:
  - Statutes or regulations specific to agency
  - Statutes protecting F&W, such as Endangered Species Act (ESA)
  - National Environmental Policy Act (NEPA)
- **BUT: These agencies generally do not have direct mandates to manage fish and wildlife under statutes discussed later, nor to regulate "take"**

9

National Marine Fisheries Service (NMFS)

- A division of the National Oceanic and Atmospheric Administration, which is a bureau of Commerce
- NOAA created by executive order by Nixon in 1970; currently no "mandate" (organic act)
- Duties
  - Administer marine fisheries under the Magnuson-Stevens Act and in partnership with regional fishery councils
    - Productive & sustainable fisheries
  - **Protect and recover endangered and threatened species of marine fish and marine mammals**
  - Ensure safe sources of seafood

Arctic Cod Photo: USFWS

NOAA FISHERIES
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

10

NMFS's Fishery Conservation Standards

16 U.S.C. § 1851. National standards for fishery conservation and management

(a) In general
Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this subchapter shall be consistent with the following national standards for fishery conservation and management:

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

(2) Conservation and management measures shall be based upon the best scientific information available […]

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U.S. Fish & Wildlife Service (FWS)

- A bureau of Interior
- Statutory "mandate" is Fish and Wildlife Coordination Act, 16 U.S.C. § 661, *et seq*.
- Duties
  - **Enforce federal wildlife laws**
  - **Protect endangered and threatened species**
  - **Manage migratory birds**
  - **Restore nationally significant fisheries**
  - **Conserve and restore wildlife habitat**
  - Help foreign governments with conservation
  - Distribute funds under the Wildlife and Sport Fish Restoration Program
  - Facilitate partnership programs

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DOI/FWS Conservation Duties

16 U.S.C. § 742f. (Fish and Wildlife Act of 1956, as amended)
Powers of Secretaries of the Interior and Commerce

(a) Policies, procedures, and recommendations
The Secretary of the Interior, with such advice and assistance as he may require from the Assistant Secretary for Fish and Wildlife, **shall consider and determine the policies and procedures that are necessary and desirable in carrying out efficiently and in the public interest the laws relating to fish and wildlife.** The Secretary, with the assistance of the departmental staff herein authorized, shall—
[…]
(4) **take such steps as may be required for the development, advancement, management, conservation, and protection of fish and wildlife resources** including, but not limited to, research, development of existing facilities, and acquisition by purchase or exchange of land and water, or interests therein.

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Major Federal Laws Protecting Fish & Wildlife

- Endangered Species Act (ESA), 16 U.S.C. § 1531, et seq.
- Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)
- Migratory Bird Treaty Act, 16 U.S.C. § 703, et seq.
- Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. § 668, et seq.
- Lacey Act, 16 U.S.C. § 3371, et seq.
- Magnuson-Stevens Act, 16 U.S.C. § 1801, et seq.
- Marine Mammal Protection Act (MMPA) 16 U.S.C. § 1361, et seq.

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Constitutional Basis for Federal F&W Laws

ENUMERATED FEDERAL POWERS

Commerce Clause (Art. I, § 8, Cl. 3) - "Congress shall have the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Necessary and Proper Clause (Art. I, § 8, Cl. 18) - "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Treaty Clause (Art. II, § 2, Cl. 2) - "[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur. . . ."

Property Clause (Art. IV, § 3, Cl. 2) - "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

Supremacy Clause (Art. VI, Cl. 2) - "This Constitution, and the laws of the United States . . . and all treaties made . . . under the authority of the United States, shall be the supreme law of the Land."

15

Utah Prairie Dog Case

- "We conclude that Congress had a rational basis to believe that regulation of the take of the Utah prairie dog on nonfederal land is an essential part of the ESA's broader regulatory scheme which, in the aggregate, substantially affects interstate commerce." – *People for the Ethical Treatment of Property Owners v. FWS*, 852 F.3d 990, 1002 (10th Cir. 2017)

Photo credit: Laura Romin & Larry Dalton, FWS

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Constitutional Basis for Federal F&W Laws

BUT: Federal power is limited by, among other things:

The Tenth Amendment:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

…and case law:

> *U.S. v Lopez*, 514 U.S. 549, 552 (1995): recognizing limits on the Commerce Clause; no general federal police power; federal government is one of enumerated powers.

> *Kleppe v. New Mexico*, 426 U.S. 529 (1976): states have broad trustee and police power over wildlife, but Property Clause was sufficient basis for Wild Free-Ranging Horses and Burros Act, giving federal government authority over horses and burros on federal land

17

ESA Overview

Image credit: FWS

- Administered by FWS (land, freshwater species), by NMFS (marine species, anadromous fish)
- Best known for prohibition on **take** of listed species; also prohibits trafficking in listed species
- Key sections
  - § 3: definitions
  - § 4: species listing, critical habitat, and recovery
  - § 6: cooperation with states
  - § 7: interagency cooperation
  - § 8A: implements CITES; designates FWS to administer
  - § 9: take prohibition
  - § 10: exceptions to prohibition
  - § 11: penalties

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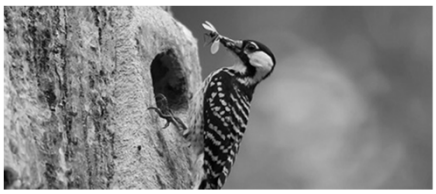
ESA Section 4 – Determination of E&T Species, Critical Habitat, Recovery Plans

- Services maintain lists of **endangered** and **threatened** species
- Citizens can **petition** to have species added or removed
- Services are to make listing decisions based "solely on the best scientific and commercial data available" (no economic calculus)
- Listing (& delisting) factors found in 16 U.S.C. § 1533(a)(1)
- Listing decision:
  - 90 day finding whether petition presents substantial info
  - 12 month finding: warranted, not warranted, warranted but precluded
  - Final listing within 1 year (unless 6-mo extension)

Image credit: FWS



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ESA Sec. 4: Critical Habitat

- Occupied CH (Section 3(5)(A)(i)):
  - "specific areas within the geographical area occupied by the species at the time it is listed . . . on which are found those physical or biological features":
  - "essential to the conservation of the species" and
  - "which may require special management considerations or protection"
- Unoccupied CH: "specific areas outside the geographical area occupied by the species at the time it is listed . . . that . . . are essential for the conservation of the species." (Section 3(5)(A)(ii))
- Conservation = survival **and** recovery (Section 3(3); *Gifford Pinchot Task Force*, 378 F. 3d 1059 (9th Cir 2004))
- The Services are required to propose critical habitat concurrently with listing proposals (unless not prudent – 50 CFR Sec. 424.12(a)) and finalize the designation within one year, unless they take a one-year extension because CH is not determinable (424.12(b)). Section 4(a)(3)(A)(1), (b)(6)(A)(ii))

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Critical Habitat Standard & Exclusions

- Designate "on the basis of the best scientific data available"
- "taking into consideration the economic impact, the impact on national security, and any other relevant impact" of designating an area as CH
- may exclude an area if the benefits of exclusion outweigh the benefits of exclusion, unless exclusion would result in extinction
  - Decision not to exclude is reviewable: *Weyerhaeuser v. FWS*, 139 S. Ct. 361 (2018) (dusky gopher frog)
- Designating private land will not affect the landowners' rights to use the land as they wish unless a Federal nexus to the activity exists (i.e., triggering Section 7)
  - No penalty for altering or destroying critical habitat on private land if there is no Federal nexus to the activity

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ESA Sec. 4: Recovery

- Five (a)(1) factors apply to delisting decisions (50 CFR Sec. 424.11(e)(2))
  - Delistings are historically rare, but most listed species have not gone extinct
- Five-year reviews (Sec. 4(c)(2))
- Recovery plans (Sec. 4(f))

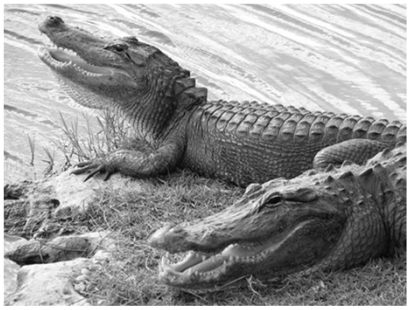

Image credit: National Park Service

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ESA Sec. 7: Interagency Cooperation

- Section 7(a)(1): Federal agencies must "utilize their authorities in furtherance of the purposes of [the ESA]"
- Sec. 7(a)(2): Federal **action agencies** must consult with FWS/NMFS to ensure their **actions** do not **jeopardize** listed species or **destroy/adversely modify** critical habitat
  - May affect: informal consultation (biological assessment)
  - Likely to adversely affect: formal consultation (biological opinion; incidental take statement, reasonable & prudent measures, terms and conditions)
  - Likely to jeopardize / ad mod: reasonable & prudent alternatives
- Section 7(d): irreversible or irretrievable commitment of resources
- *TVA v. Hill*, 437 U.S. 153 (1978) (snail darter case)
- Exemption process (7(e))

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Endangered Species Act – § 8A CITES Convention on International Trade in Endangered Species of Flora and Fauna

- The U.S. is a signatory to CITES , along with about 180 other countries; ESA Sec. 8 implements CITES for the U.S.
- Signatories agree to assist in controlling the trafficking of listed species and do so in part through a permitting system, which they operate through a Management Authority and Scientific Authority (ex: USFWS)
- 3 lists
  - Appendix I – commercial trade generally prohibited
  - Appendix II – commercial trade controlled; non-detriment finding needed
  - Appendix III – commercial trade controlled; no non-detriment finding needed but still may need certificate or paperwork

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ESA Sec. 9 – Prohibited Acts (highlights)

- Take: harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect (Sec. 3(19)) regarding *endangered* fish or wildlife
- Remove, dig up, cut, maliciously damage or destroy any *endangered* plant on land subject to U.S. jurisdiction; or remove, dig up, cut, damage, or destroy in violation of State law
- Import/export any listed species (without a permit)
- Possess, sell, deliver, carry, transport, or ship any "taken" species (of fish or wildlife)
- Deliver, receive, carry, transport, or ship in interstate or foreign commerce & in course of commercial activity any listed species
- Sell or offer for sale any listed species
- Violate any regulation promulgated under Sec. 4 (a 4(d) rule)
- Violate CITES (trade in listed species in violation of Convention)
- *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995): Take includes "significant habitat modification or degradation where it actually kills or injures wildlife"

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Sec. 10, Exceptions (Highlights)

- Safe Harbor Agreement
  - Private landowners and FWS agree to with the goal of conserving listed species
  - 10(a)(1)(A) enhancement of survival permit (for incidental take)
  - Assurance to landowners that FWS will not require additional conservation beyond activities agreed to (even if more individuals come to the property)
  - Landowners can choose to alter their land back to baseline when agmt ends
- Incidental Take Permit 10(a)(1)(B)
  - Issued to private applicants who may incidentally take listed species
  - Applicants must submit a habitat conservation plan that explains the impact to the species from the project, how they will minimize and mitigate the impact and funding available, alternatives considered and rejected, and other measures FWS may require
  - May trigger the National Environmental Policy Act (NEPA), depending on the size and specifics of the proposed project
  - Must go out for public comment
  - FWS will consider several factors before deciding to issue permit (10(a)(2)(B))
  - Permit can be revoked

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Sec. 11 – Penalties and Enforcement

- "knowing" violation of Act or regulation w/ regard to an endangered species:
  - Civil penalty of up to $25K *per violation*
  - Criminal penalty of up to $50K / 1 year max imprisonment
- "knowing" violation of regulation w/ regard to threatened species:
  - Civil penalty of up to $12K *per violation*
  - Criminal penalty of up to $25K / 6 mos. max imprisonment
  - Other violations (no mens rea) = $500 civil penalty *per violation*
- Inflation adjustment for civil penalties
- Forfeiture

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ESA Judicial Review

- Judicial review provisions at § § 4(b)(3)(C)(ii) and 11(g)
  - Section 4 – can challenge 90-day and 12-month not warranted or warranted but precluded petition finding
  - Section 11(g) – citizen suits
    - (g)(1)(A) – injunctions against any violator, including the government
    - (B) – citizen suits against third parties for alleged take
    - (C) – citizen suits against FWS or NMFS for alleged failure to carry out any **nondiscretionary duty**
- Judicial review under APA (5 U.S.C. § 706)
  - "Unlawfully withheld or unreasonably delayed"
  - "Arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law"

Image credit: Ayla Skorupa, USGS

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Migratory Bird Treaty Act - Prohibitions

- Originally passed to codify treaty between the UK (Canada) and the U.S.; later Russia, Japan, and Mexico
- Protects many species of game and non-game birds (list at 50 CFR § 10.13)
- Prohibitions:
  - Unlawful to "pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any [native] migratory bird, any part, nest, or egg of any such bird, or any product…" (16 U.S.C. § 703(a))
  - Trafficking in any bird/part/product protected by state or international law unlawful, and importing birds illegally taken in Canada (16 U.S.C. § 705)
  - Taking a migratory game bird over bait or baiting an area for birds (16 U.S.C. § 704(b))

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MBTA – Penalties (16 U.S.C. § 707)

- misdemeanor: for violating any provision or regulation
  - Strict liability offense (but enforced?)
  - Up to $15K penalty / 6 mos. incarceration
- felony: for knowingly violating trafficking prohibitions
  - Up to $2K fine / 2 years' incarceration
- baiting violation: misdemeanor – fined under Title 18, U.S.C.; up to 1 year incarceration
- Forfeiture of guns/vehicles/etc. for felony violation
- No citizen suit provision

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MBTA: Incidental Take

- Major causes of "incidental" bird death: habitat loss; outdoor cats; collision with buildings/facilities, infrastructure, and cars
- FWS has never issued incidental take regulations, although it could under the statute
- Circuit split on question; revolves around whether MBTA is a hunting/poaching statute, or if it reaches incidental take. See, e.g.:
  - *U.S. v. Apollo Energies*, *Inc.*, 611 F. 3d. 679, 686 (10th Cir. 2010) (reaches incidental take)
  - U.S. v *Citgo Petroleum Corp*., 801 F3d 477 (5th Cir. 2015) (does not include incidental take)
- Different administrations have taken different approaches to enforcement (generally against corporations, not individuals)
  - DOI Solicitor issued M-Opinion at end of Obama admin (M-37041) that incidental take violated the MBTA
  - DOI P.D. Solicitor suspended that M-Opinion; issued M-37050 in Dec. 2017 concluding opposite
  - *Nat. Resources Defense Council v. DOI*, 397 F. Supp. 3d 430 (S.D.N.Y. July 31, 2019) – challenge to M-37050; on MTD, court denied MTD case on standing, ripeness, finality args. & that M.O. triggered NEPA. Case going to summary judgment.
  - FWS issued proposed rule codifying M-Opinion (2/3/20; 85 Fed. Reg. 5915]

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Other MBTA Provisions of Note

- **§ 704(a): authority to Secy. to create exceptions by regulation**
- **§ 708: preemption; limited grant of authority to states to enact stricter or consistent laws**
- § 711: exception for breeding migratory birds on farms and preserves, for food
- § 712: exception for Alaskan natives' subsistence needs; authorizes Secy. to enact MBTA regs
- 50 CFR § 20.20-40: migratory bird hunting regs
- 50 CFR § 20.100 hunting seasons (Flyways set for some species)
- 50 CFR § 20.41-60: interstate transport, import and export; includes marking
- 50 CFR § 21: permits for import/export, scientific research, taxidermy, depredation, falconry, etc. (**but not for incidental take**)
- *§ 718: Migratory Bird Conservation and Hunting Stamp Act (not part of MBTA)

Image credit: FWS, Mike Sweet

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Bald & Golden Eagle Protection Act – Prohibitions and Penalties

- Protects bald and golden eagles by prohibiting the following:
  - **"Whoever . . . shall knowingly, or with wanton disregard for the consequences of his act** take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof," [is liable for a **criminal** penalty]
  - "Whoever . . . shall take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle, commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof," [is liable for a **civil** penalty] (16 U.S.C. § 668)
- Penalties
  - Criminal: $5K / 1 year max for 1st offense; $10K / 2 yrs max for 2nd. Each act treated as a separate offense
  - Civil: $5K per offense

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Eagle Take Permits

- Major threats to eagles are electrocution, wind turbines, and shooting/poisoning
- Exceptions (16 U.S.C. § 668a)
  - Generally:
    - take "compatible with the preservation of [eagles]" permitted (for "agriculture or other interests")can be permitted
    - Preservation standard: "consistent with the goal of stable or increasing breeding populations"
  - Incidental take of eagles permitted; (50 CFR 22.26) permit holders must avoid and minimize take, and if not, compensatory mitigation may be required, as well as monitoring
    - Compensatory mitigation required for all take that would exceed Eagle Management Unit take limits (set at zero for golden eagles)
    - Only third-party mitigation option now is retrofitting power poles
    - Golden eagle take permits typically require more mitigation; populations are not doing as well as bald eagle populations
    - Permits may be issued for up to 30 years, with 5-year reviews
  - Permits for take of specimens for scientific use
  - Permits for take of specimens for Native American religious use

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Magnuson-Stevens Act

- 16 U.S.C. § 1801, et seq.
- Primary law governing marine fisheries management in U.S. federal waters
- First enacted in 1976; amended in 1996 with Sustainable Fisheries Act and 2007 with the Reauthorization Act
- NMFS carries out its provisions, sharing responsibility with 8 regional fishery management councils
- Sets national standards for conservation and management
- Sets up regional fishery councils
- Sets standards for foreign fishing in U.S. territorial waters
- Sets up research and monitoring programs
- Has many specific prohibitions

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Marine Mammal Protection Act

- 16 U.S.C. § 1361, et seq.
- Protects whales and dolphins, manatees and dugongs, members of the seal family, polar bears, and sea otters.
- NMFS and FWS share responsibility, depending on the species
- Prohibits take of, as well as trafficking in, marine mammals and parts and products
  - Take: "harass, hunt, capture, or kill, or attempt [any of those acts]" 16 U.S.C. § 1362
- Exceptions – can get take permits; Native American uses; state/local gov't (saving animal); incidental to commercial fishing…
- Sets up Marine Mammal Commission to advise the Secretaries on conservation

Image credit: NOAA Fisheries

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Lacey Act, generally

- 16 U.S.C. § 3371, et seq.
- First federal wildlife statute (circa 1900)
- Enacted for three major reasons
- Best known for provisions making violations of other laws illegal (backstops state, international, tribal, and other federal law – these are predicate offenses)
- Legacy

Image credit: National Park Service

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Lacey Act: Penalties

- Targets illegal trafficking in fish, wildlife, and plants.
  - Prohibits "import, export, transport, [sale], recei[pt], acqui[sition], or purchase of any fish wildlife or plant" [same verbs] in violation of federal or tribal law
  - Prohibits interstate or foreign commerce in F, W, P [same verbs] in violation of state or foreign law
  - Sale includes sale or purchase of guiding services to illegally take F/W
- Helps protect public safety and ensure a level playing field for industry by prohibiting false labelling of shipments of F, W, P
- Prohibits trafficking in "injurious species" ex// zebra mussels, brown tree snakes (misdemeanor)
- Trafficking penalties increase with mens rea requirements
  - "in exercise of due care should know" that F, W, P are illegal = civil penalty (≤ $10K)
  - "knowingly engages in conduct" and "in exercise of due care should know" that F, W, P illegal = misdemeanor (≤ $10K, ≤ 1 year)
  - Knowingly imports or exports OR knowingly engages in conduct and knows F, W, P illegal = felony (≤ $20K, ≤ 5 yrs)

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Law	Civil Penalty*	Criminal Penalty
ESA (16 USC 1540)	Depends on mens rea; max ranges from $25K to $12K to $500	Misdemeanor: ≤ $50K fine / ≤ 1 yr
MBTA (16 USC 707)	(none)	Misdemeanor: Strict Liab: ≤ $15K fine / ≤ 6 mos Baiting: USC Title 18 fine / ≤ 1 yr Felony: ≤ $2K fine / ≤ 2 yrs
BGEPA (16 USC 668)	≤ $5K	Misdemeanor: ≤ $5K fine / ≤ 1 yr Felony: ≤ $10K fine / ≤ 2 yrs
MMPA (16 USC 1375)	≤ $10K	Misdemeanor: ≤ $20K fine / ≤ 1 yr
M-S (16 USC 1857-58)	≤ $100K	Misdemeanor: ≤ $100K fine / ≤ 6 mos Felony: ≤ $200K fine / ≤ 10 yrs
Lacey (16 USC 3373)	≤ $10K (if value of FWP is less than $350; otherwise could be lower)	Misdemeanor: ≤ $10K fine / ≤ 1 yr Felony: ≤ $20K fine / ≤ 5 yrs

*Penalties will be adjusted for inflation.

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Some Useful Resources

- Listed Species
  - ESA: https://ecos.fws.gov/ecp/
  - Migratory Birds https://www.fws.gov/birds/management/managed-species/migratory-bird-treaty-act-protected-species.php
  - IPAC: https://ecos.fws.gov/ipac/
- ESA Permitting: https://www.fws.gov/endangered/permits/index.html
- Upcoming rulemakings (Unified Agenda): https://www.reginfo.gov/public/do/eAgendaMain#
- Title 50 CFR: https://www.ecfr.gov/cgi-bin/text-idx?SID=20d91d7dd670305003020c510a683c14&mc=true&tpl=/ecfrbrowse/Title50/50tab_02.tpl

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U.S. Fish & Wildlife Service

ENDANGERED SPECIES ACT OF 1973

As Amended through the

108th Congress

Department of the Interior
U.S. Fish and Wildlife Service
Washington, D.C. 20240

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ENDANGERED SPECIES ACT OF 1973*

FINDINGS, PURPOSES, AND POLICY

SEC. 2. (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

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*As amended by P.L. 94-325, June 30, 1976; P.L. 94-359, July 12, 1976; P.L. 95-212, December 19, 1977; P.L. 95-632, November 10, 1978; P.L. 96-159, December 28, 1979; P.L. 97-304, October 13, 1982; P.L. 98-327, June 25, 1984; and P.L. 100-478, October 7, 1988; P.L. 107-171, May 13, 2002; P.L. 108-136, November 24, 2003.

departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.

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

DEFINITIONS

SEC. 3. For the purposes of this Act—

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

(2) The term "commercial activity" means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however*, That it does not include exhibition of commodities by museums or similar cultural or historical organizations.

(3) The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

(4) The term "Convention" means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto.

(5)(A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

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

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

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

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

(A) between persons within one foreign country;

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

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

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

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

(11) [Repealed]

(12) The term "permit or license applicant" means, when used with respect to an action of a Federal agency for which exemption is sought under section 7, any person whose application to such agency for a permit or license has been denied primarily because of the application of section 7(a) to such agency action.

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

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

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

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

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

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

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

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

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

DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

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

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

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

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

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

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

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

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

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

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

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

(ii) be changed in status from an endangered species to a threatened species, he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; an(C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

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

(i) 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

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

(B)(i) 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 101of 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.

(ii) Nothing in this paragraph affects the requirement to consult under section 7(a)(2) with respect to an agency action (as that term is defined in that section).

(iii) Nothing in this paragraph affects the obligation of the Department of Defense to comply with section 9, including the prohibition preventing extinction and taking of endangered species and threatened species.

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

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

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

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

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, 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, 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 to prevent a significant risk to the well being of any such species.

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

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

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

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

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

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

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

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

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

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

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

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

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

(I) a final regulation to implement such determination,

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

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

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

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

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

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

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

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

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

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that—

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

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

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

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

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

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

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

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

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

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

(3) The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed.

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

(5) Each Federal agency shall, prior to implementation of a new or revised recovery plan, consider all information presented during the public comment period under paragraph (4).

(g) MONITORING.—(1) The Secretary shall implement a system in cooperation with the States to monitor effectively for not less than five years the status of all species which have recovered to the point at which the measures provided pursuant to this Act are no longer necessary and which, in accordance with the provisions of this section, have been removed from either of the lists published under subsection (c).

(2) The Secretary shall make prompt use of the authority under paragraph 7 of subsection (b) of this section to prevent a significant risk to the well being of any such recovered species.

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

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

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

(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.

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

LAND ACQUISITION

SEC. 5. (a) PROGRAM.—The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 4 of this Act. To carry out such a program, the appropriate Secretary—

(1) shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended, the Fish and Wildlife Coordination Act, as amended, and the Migratory Bird Conservation Act, as appropriate; and

(2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interests therein, and such authority shall be in addition to any other land acquisition authority vested in him.

(b) ACQUISITIONS.—Funds made available pursuant to the Land and Water Conservation Fund Act of 1965, as amended, may be used for the purpose of acquiring lands, waters, or interest therein under subsection (a) of this section.

COOPERATION WITH THE STATES

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

(b) MANAGEMENT AGREEMENTS.—The Secretary may enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species. Any revenues derived from the administration of such areas under these agreements shall be subject to the provisions of section 401 of the Act of June 15, 1935 (49 Stat. 383; 16 U.S.C. 715s).

(c) COOPERATIVE AGREEMENTS.—(1) In furtherance of the purposes of this Act, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this Act. Unless he determines, pursuant to this paragraph that the State program is not in accordance with this Act, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species and threatened species, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program —

(A) authority resides in the State agency to conserve resident species of fish or wildlife determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this Act, for all resident species of fish or

wildlife in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

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

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

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

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

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

(2) In furtherance of the purposes of this Act, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species of plants. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this Act. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this Act, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species of plants and threatened species of plants, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program—

(A) authority resides in the State agency to conserve resident species of plants determined by the State agency or the Secretary to be endangered or threatened;

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

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

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

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

(ii) plans are included under which immediate attention will be given to

those resident species of plants which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1) [16 USCS § § 1533(d), 1538(a)(1)] with respect to the taking of any resident endangered or threatened species.

(d) ALLOCATION OF FUNDS.—(1) The Secretary is authorized to provide financial assistance to any State, through its respective State agency, which has entered into a cooperative agreement pursuant to subsection (c) of this section to assist in development of programs for the conservation of endangered and threatened species or to assist in monitoring the status of candidate species pursuant to subparagraph (C) of section 4(b)(3) and recovered species pursuant to section 4(g). The Secretary shall allocate each annual appropriation made in accordance with the provisions of subsection (i) of this section to such States based on consideration of—

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

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

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

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

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

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

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

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

(2) Such cooperative agreements shall provide for (A) the actions to be taken by the Secretary and the States; (B) the benefits that are expected to be derived in connection with the conservation of endangered or threatened species; (C) the estimated cost of these actions; and (D) the share of such costs to be borne by the Federal Government and by the States; except that—

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

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

The Secretary may, in his discretion, and under such rules and regulations as he may prescribe, advance funds to the State for financing the United States pro rata share agreed upon in the cooperative agreement. For the purposes of this section, the non-Federal share may, in the discretion of the Secretary, be in the form of money or real property, the value of which will be determined by the Secretary, whose decision shall be final.

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

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

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

(2) The prohibitions set forth in or authorized pursuant to sections 4(d) and 9(a)(1)(B) of this Act shall not apply with respect to the taking of any resident endangered species or threatened species (other than species listed in Appendix I to the Convention or otherwise specifically covered by any other treaty or Federal law) within any state—

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

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

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

(ii) the Secretary applies such prohibition after he finds, and publishes his finding, that an emergency exists posing a significant risk to the well-being of such species and that the prohibition must be applied to protect such species. The Secretary's finding and publication may be made without regard to the public hearing or comment provisions of section 553 of title 5, United States Code, or any other provision of this Act; but such prohibition shall expire 90 days after the date of its imposition unless the Secretary further extends such prohibition by publishing notice and a statement of justification of such extension.

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

(i) APPROPRIATIONS.—(1) To carry out the provisions of this section for fiscal years after September 30, 1988, there shall be deposited into a special fund known as the cooperative endangered species conservation fund, to be administered by the Secretary, an amount equal to 5 percent of the combined amounts covered each fiscal year into the Federal aid to wildlife restoration fund under section 3 of the Act of September 2, 1937, and paid, transferred, or otherwise credited each fiscal year to the Sport Fishing Restoration Account established under 1016 of the Act of July 18, 1984.

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

INTERAGENCY COOPERATION

SEC. 7. (a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS.—(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

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

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4 or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

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

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within

a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

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

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

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

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

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

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

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

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

(B) Consultation under subsection (a)(3), and an opinion 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 commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

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

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

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

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972;

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

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

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

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

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

(c) BIOLOGICAL ASSESSMENT.—(1) To facilitate compliance with the requirements of subsection (a)(2), each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on the date of enactment of the Endangered Species Act Amendments of 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as 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).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

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

(e)(1) ESTABLISHMENT OF COMMITTEE.—There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with 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.

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

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

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

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

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

(G) The President, after consideration of any recommendations received pur-

suant to subsection (g)(2)(B) shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

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

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

(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

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

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

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

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act, the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

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

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

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

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

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) REGULATIONS.—Not later than 90 days after the date of enactment of the En-

dangered Species Act Amendments of 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to —

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

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

(g) Application for Exemption and Report to the Committee.—(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2), the Secretary's opinion under subsection (b) indicates that the agency action would violate subsection (a)(2). An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

(A) determine that the Federal agency concerned and the exemption applicant have—

(i) carried out the consultation responsibilities described in subsection (a) in good faith and made a reasonable and responsible effort to develop and

fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2);

(ii) conducted any biological assessment required by subsection (c); and

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

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5, United States Code.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of title 5, United States Code, and prepare the report to be submitted pursuant to paragraph (5).

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

(A) 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;

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

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

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

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5, United States Code.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

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

(h) EXEMPTION.—(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5). The Committee shall grant an exemption from the requirements of subsection (a)(2) for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the

record of the hearing held under subsection (g)(4) and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

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

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

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5 of the United States Code.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) or was not identified in any biological assessment conducted under subsection (c), and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) REVIEW BY SECRETARY OF STATE.—Notwithstanding any other provision of this Act, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Notwithstanding any other provision of this Act, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) SPECIAL PROVISIONS.—An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environ-

mental Policy Act of 1969 (42 U.S.C. 4321 et seq.): *Provided,* That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(l) COMMITTEE ORDERS.—(1) If the Committee determines under subsection (h) that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and 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.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such 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.

(m) NOTICE.—The 60-day notice requirement of section 11(g) of this Act shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) JUDICIAL REVIEW. —Any person, as defined by section 3(13) of this Act, may obtain judicial review, under chapter 7 of title 5 of the United States Code, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112, of title 28, United States Code. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) Notwithstanding sections 4(d) and 9(a)(1)(B) and (C), sections 101 and 102 of the Marine Mammal Protection Act of 1972, or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in

a written statement provided under subsection (b)(4)(iv) shall not be considered to be a prohibited taking of the species concerned.

(p) EXEMPTIONS IN PRESIDENTIALLY DECLARED DISASTER AREAS.—In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act, the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act, and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

INTERNATIONAL COOPERATION

SEC. 8. (a) FINANCIAL ASSISTANCE.—As a demonstration of the commitment of the United States to the worldwide protection of endangered species and threatened species, the President may, subject to the provisions of section 1415 of the Supplemental Appropriation Act, 1953 (31 U.S.C. 724), use foreign currencies accruing to the United States Government under the Agricultural Trade Development and Assistance Act of 1954 or any other law to provide to any foreign country (with its consent) assistance in the development and management of programs in that country which the Secretary determines to be necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 4 of this Act. The President shall provide assistance (which includes, but is not limited to, the acquisition, by lease or otherwise, of lands, waters, or interests therein) to foreign countries under this section under such terms and conditions as he deems appropriate. Whenever foreign currencies are available for the provision of assistance under this section, such currencies shall be used in preference to funds appropriated under the authority of section 15 of this Act.

(b) ENCOURAGEMENT OF FOREIGN PROGRAMS.—In order to carry out further the provisions of this Act, the Secretary, through the Secretary of State, shall encourage—

(1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 4 of this Act;

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

(3) foreign persons who directly or indirectly take fish or wildlife or plants in foreign countries or on the high seas for importation into the United States for commercial or other purposes to develop and carry out with such assistance as he may provide, conservation practices designed to enhance such fish or wildlife or plants and their habitat.

(c) PERSONNEL.—After consultation with the Secretary of State, the Secretary may—

(1) assign or otherwise make available any officer or employee of his department for the purpose of cooperating with foreign countries and international organizations in developing personnel resources and programs which promote the conservation of fish or wildlife or plants; and

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

(d) INVESTIGATIONS.—After consultation with the Secretary of State and the Secretary of the Treasury, as appropriate, the Secretary may conduct or cause to be conducted such law enforcement investigations and research abroad as he deems necessary to carry out the purposes of this Act.

CONVENTION IMPLEMENTATION

SEC. 8A. (a) MANAGEMENT AUTHORITY AND SCIENTIFIC AUTHORITY.—The Secretary of the Interior (hereinafter in this section referred to as the "Secretary") is designated as the Management Authority and the Scientific Authority for purposes of the Convention and the respective functions of each such Authority shall be carried out through the United States Fish and Wildlife Service.

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

(c) SCIENTIFIC AUTHORITY FUNCTIONS.—(1) The Secretary shall do all things necessary and appropriate to carry out the functions of the Scientific Authority under the Convention.

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

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

(e) WILDLIFE PRESERVATION IN WESTERN HEMISPHERE.—(1) The Secretary of the Interior (hereinafter in this subsection referred to as the "Secretary"), in cooperation with the Secretary of State, shall act on behalf of, and represent, the United States in all regards as required by the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (56 Stat. 1354, T.S. 982, hereinafter in this subsection referred to as the "Western Convention"). In the discharge of these responsibilities, the Secretary and the Secretary of State shall consult with the Secretary of Agriculture, the Secretary of Commerce, and the heads of other agencies with respect to matters relating to or affecting their areas of responsibility.

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

(A) cooperation with contracting parties and international organizations for

the purpose of developing personnel resources and programs that will facilitate implementation of the Western Convention.

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

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

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

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

PROHIBITED ACTS

SEC. 9. (a) GENERAL.—(1) Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to—

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

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

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

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

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

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

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

(2) Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of plants listed pursuant to section 4 of this Act, it is unlawful for any person subject to the jurisdiction of the United States to—

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

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

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

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

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

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

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

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

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

(B) Any person holding any raptor or progeny described in subparagraph (A) must be able to demonstrate that the raptor or progeny does, in fact, qualify under the provisions of this paragraph, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may by regulation require as being reasonably appropriate to carry out the purposes of this paragraph. Such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary.

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

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

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

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

(C) the applicable requirements of 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.

(d) IMPORTS AND EXPORTS.—

(1) IN GENERAL.—It is unlawful for any person, without first having obtained permission from the Secretary, to engage in business—

(A) as an importer or exporter of fish or wildlife (other than shellfish and fishery products which (i) are not listed pursuant to section 4 of this Act as endangered species or threatened species, and (ii) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants; or

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

(2) REQUIREMENTS.—Any person required to obtain permission under paragraph (1) of this subsection shall—

(A) keep such records as will fully and correctly disclose each importation or exportation of fish, wildlife, plants, or African elephant ivory made by him and the subsequent disposition made by him with respect to such fish, wildlife, plants, or ivory;

(B) at all reasonable times upon notice by a duly authorized representative of the Secretary, afford such representative access to his place of business, an opportunity to examine his inventory of imported fish, wildlife, plants, or African elephant ivory and the records required to be kept under subparagraph (A) of this paragraph, and to copy such records; and

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

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

(4) RESTRICTION ON CONSIDERATION OF VALUE 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.

(e) REPORTS.—It is unlawful for any person importing or exporting fish or wildlife (other than shellfish and fishery products which (1) are not listed pursuant to section 4 of this Act as endangered or threatened species, and (2) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants to fail to file any declaration or report as the Secretary deems necessary to facilitate enforcement of this Act or to meet the obligations of the Convention.

(f) DESIGNATION OF PORTS.— (1) It is unlawful for any person subject to the jurisdiction of the United States to import into or export from the United States any fish or wildlife (other than shellfish and fishery products which (A) are not listed pursuant to section 4 of this Act as endangered species or threatened species, and (B) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants, except at a port 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.

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

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

EXCEPTIONS

SEC. 10. (a) PERMITS.—(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

(A) any act otherwise prohibited by section 9 for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j); or

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

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

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

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

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

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

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

(i) the taking will be incidental;

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

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

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

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

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

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

(b) HARDSHIP EXEMPTIONS.—(1) If any person enters into a contract with respect to a species of fish or wildlife or plant before the date of the publication in the Federal Register of notice of consideration of that species as an endangered species and the subsequent listing of that species as an endangered species pursuant to section 4 of this Act will cause undue economic hardship to such person under the contract, the Secretary, in order to minimize such hardship, may exempt such person from the application of section 9(a) of this Act to the extent the Secretary deems appropriate if such person applies to him for such exemption and includes with such application such information as the Secretary may require to prove such hardship; except that (A) no such exemption shall be for a duration of more than one year from the date of publication in the Federal Register of notice of consideration of the species concerned, or shall apply to a quantity of fish or wildlife or plants in excess of that specified by the Secretary; (B) the one-year period for those species of fish or wildlife listed by the Secretary as endangered prior to the effective date of this Act shall expire in accordance with the terms of section 3 of the Act of December 5, 1969 (83 Stat. 275); and (C) no such exemption may be granted for the importation or exportation of a specimen listed in Appendix I of the Convention which is to be used in a commercial activity.

(2) As used in this subsection, the term "undue economic hardship" shall include, but not be limited to:

(A) substantial economic loss resulting from inability caused by this Act to perform contracts with respect to species of fish and wildlife entered into prior to the date of publication in the Federal Register of a notice of consideration of such species as an endangered species;

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

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

(3) The Secretary may make further requirements for a showing of undue economic hardship as he deems fit. Exceptions granted under this section may be limited by the Secretary in his discretion as to time, area, or other factor of applicability.

(c) NOTICE AND REVIEW.—The Secretary shall publish notice in the Federal Register of each application for an exemption or permit which is made under this section. Each notice shall invite the submission from interested parties, within thirty days after the date of the notice, of written data, views, or arguments with respect to the application; except that such thirty-day period may be waived by the Secretary in an emergency situation where the health or life of an endangered animal is threatened and no reasonable alternative is available to the applicant, but notice of any such waiver shall be published by the Secretary in the Federal Register within ten days following the issuance of the exemption or permit. Information received by the Secretary as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding.

(d) PERMIT AND EXEMPTION POLICY.—The Secretary may grant exceptions under subsections (a)(1)(A) and (b) of this section only if he finds and publishes his finding in the Federal Register that (1) such exceptions were applied for in good faith, (2) if granted and exercised will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy set forth in section 2 of this Act.

(e) ALASKA NATIVES.—(1) Except as provided in paragraph (4) of this subsection the provisions of this Act shall not apply with respect to the taking of any endangered species or threatened species, or the importation of any such species taken pursuant to this section, by—

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

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

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

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

(3) As used in this subsection—

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

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

(4) Notwithstanding the provisions of paragraph (1) of this subsection, whenever the Secretary determines that any species of fish or wildlife which is subject to taking under the provisions of this subsection is an endangered species or threatened species, and that such taking materially and negatively affects the threatened or endangered species, he may prescribe regulations upon the taking of such species by any such Indian, Aleut, Eskimo, or non-Native Alaskan resident of an Alaskan native village. Such regulations may be established with reference to species, geographical description of the area included, the season for taking, or any other factors related to the reason for establishing such regulations and consistent with the policy of this Act. Such regulations shall be prescribed after a notice and hearings in the affected judicial districts of Alaska and as otherwise required by section 103 of the Marine Mammal Protection Act of 1972, and shall be removed as soon as the Secretary determines that the need for their impositions has disappeared.

(f)(1) As used in this subsection—

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

(i) any sperm whale oil, including derivatives thereof, which was lawfully

held within the United States on December 28, 1973, in the course of a commercial activity; or

(ii) any finished scrimshaw product, if such product or the raw material for such product was lawfully held within the United States on December 28, 1973, in the course of a commercial activity.

(B) The term "scrimshaw product" means any art form which involves the substantial etching or engraving of designs upon, or the substantial carving of figures, patterns, or designs from, any bone or tooth of any marine mammal of the order Cetacea. For purposes of this subsection, polishing or the adding of minor superficial markings does not constitute substantial etching, engraving, or carving.

(2) The Secretary, pursuant to the provisions of this subsection, may exempt, if such exemption is not in violation of the Convention, any pre-Act endangered species part from one or more of the following prohibitions:

(A) The prohibition on exportation from the United States set forth in section 9(a)(1)(A) of this Act.

(B) Any prohibition set forth in section 9(a)(1)(E) or (F) of this Act.

(3) Any person seeking an exemption described in paragraph (2) of this subsection shall make application therefor to the Secretary in such form and manner as he shall prescribe, but no such application may be considered by the Secretary unless the application—

(A) is received by the Secretary before the close of the one-year period beginning on the date on which regulations promulgated by the Secretary to carry out this subsection first take effect;

(B) contains a complete and detailed inventory of all pre-Act endangered species parts for which the applicant seeks exemption;

(C) is accompanied by such documentation as the Secretary may require to prove that any endangered species part or product claimed by the applicant to be a pre-Act endangered species part is in fact such a part; and

(D) contains such other information as the Secretary deems necessary and appropriate to carry out the purposes of this subsection.

(4) If the Secretary approves any application for exemption made under this subsection, he shall issue to the applicant a certificate of exemption which shall specify—

(A) any prohibition in section 9(a) of this Act which is exempted;

(B) the pre-Act endangered species parts to which the exemption applies;

(C) the period of time during which the exemption is in effect, but no exemption made under this subsection shall have force and effect after the close of the three-year period beginning on the date of issuance of the certificate unless such exemption is renewed under paragraph (8); and

(D) any term or condition prescribed pursuant to paragraph (5)(A) or (B), or both, which the Secretary deems necessary or appropriate.

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

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

(B) terms and conditions which may be imposed on any subsequent purchaser of any pre-Act endangered species part covered by an exemption granted under this subsection;

to insure that any such part so exempted is adequately accounted for and not disposed of contrary to the provisions of this Act. No regulation prescribed by the Secretary to carry out the purposes of this subsection shall be subject to section 4(f)(2)(A)(i) of this Act.

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

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

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

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

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

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

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

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

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

(g) In connection with any action alleging a violation of section 9, any person claiming the benefit of any exemption or permit under this Act shall have the burden of proving that the exemption or permit is applicable, has been granted, and was valid and in force at the time of the alleged violation.

(h) CERTAIN ANTIQUE ARTICLES.—(1) Sections 4(d), 9(a), and 9(c) do not apply to any article which—

(A) is not less than 100 years of age;

(B) is composed in whole or in part of any endangered species or threatened species listed under section 4;

(C) has not been repaired or modified with any part of any such species on or after the date of the enactment of this Act; and

(D) is entered at a port designated under paragraph (3).

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

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

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

(A) was not repaired or modified after the date of importation with any part of any endangered species or threatened species listed under section 4;

(B) was forfeited to the United States before such date of the enactment, or is subject to forfeiture to the United States on such date of enactment, pursuant to the assessment of a civil penalty under section 11; and

(C) is in the custody of the United States on such date of enactment;

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

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

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

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

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

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

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

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

(j) Experimental Populations.—(1) For purposes of this subsection, the term "experimental population" means any population (including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when,

and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.

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

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

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

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

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

(3) The Secretary, with respect to populations of endangered species or threatened species that the Secretary authorized, before the date of the enactment of this subsection, for release in geographical areas separate from the other populations of such species, shall determine by regulation which of such populations are an experimental population for the purposes of this subsection and whether or not each is essential to the continued existence of an endangered species or a threatened species.

PENALTIES AND ENFORCEMENT

SEC. 11. (a) CIVIL PENALTIES.— (1) Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of this Act, or any provision of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d) (other than regulation relating to recordkeeping or filing of reports), (f) or (g) of section 9 of this Act, may be assessed a civil penalty by the Secretary of not more than $ 25,000 for each violation. Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of any other regulation issued under this Act may be assessed a civil penalty by the Secretary of not more than $ 12,000 for each such violation. Any person who otherwise violates any provision of this Act, or any regulation, permit, or certificate issued hereunder, may be assessed a civil penalty by the Secretary of not more than $ 500 for each such violation. No penalty may be assessed under this subsection unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is

found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. The court shall hear such action on the record made before the Secretary and shall sustain his action if it is supported by substantial evidence on the record considered as a whole.

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

(3) Notwithstanding any other provision of this Act, no civil penalty shall be imposed if it can be shown by a preponderance of the evidence that the defendant committed an act based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species.

(b) Criminal Violations.—(1) Any person who knowingly violates any provision of this Act, of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F); (a)(2)(A), (B), (C), or (D), (c), (d) (other than a regulation relating to recordkeeping, or filing of reports), (f), or (g) of section 9 of this Act shall, upon conviction, be fined not more than $ 50,000 or imprisoned for not more than one year, or both. Any person who knowingly violates any provision of any other regulation issued under this Act shall, upon conviction, be fined not more than $ 25,000 or imprisoned for not more than six months, or both.

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

(3) Notwithstanding any other provision of this Act, it shall be a defense to prosecution under this subsection if the defendant committed the offense based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual, from bodily harm from any endangered or threatened species.

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

(d) REWARDS AND CERTAIN INCIDENTAL EXPENSES.—The Secretary or the Secretary of the Treasury shall pay, from sums received as penalties, fines, or forfeitures of property for any violation of this Act or any regulation issued hereunder (1) a reward to any person who furnishes information which leads to an arrest, a criminal conviction, civil penalty assessment, or forfeiture of property for any violation of this Act or any regulation issued hereunder, and (2) the reasonable and necessary costs incurred by any person in providing temporary care for any fish, wildlife, or plant pending the disposition of any civil or criminal proceeding alleging a violation of this Act with respect to that fish, wildlife, or plant. The amount of the reward, if any, is to be designated by the Secretary or the Secretary of the Treasury, as appropriate. Any officer or employee of the United States or any State or local government who furnishes information or renders service in the performance of his official duties is ineligible for payment under this subsection. Whenever the balance of sums received under this section and section 6(d) of the Act of November 16, 1981 (16 U.S.C. 3375(d)), as penalties or fines, or from forfeitures of property, exceed $ 500,000, the Secretary of the Treasury shall deposit an amount equal to such excess balance in the cooperative endangered species conservation fund established under section 6(i) of this Act.

(e) ENFORCEMENT.—(1) The provisions of this Act and any regulations or permits issued pursuant thereto shall be enforced by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, or all such Secretaries. Each such Secretary may utilize by agreement, with or without reimbursement, the personnel, services, and facilities of any other Federal agency or any State agency for purposes of enforcing this Act.

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

(3) Any person authorized by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, to enforce this Act may detain for inspection and inspect any package, crate, or other container, including its contents, and all accompanying documents, upon importation or exportation. Such person may make arrests without a warrant for any violation of this Act if he has reasonable grounds to believe that the person to be arrested is committing the violation in his presence or view, and may execute and serve any arrest warrant, search warrant, or other warrant or civil or criminal process issued by any officer or court of competent jurisdiction for enforcement of this Act. Such person so authorized may search and seize, with or without a warrant, as authorized by law. Any fish, wildlife, property, or item so seized shall be held by any person authorized by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating pending disposition of civil or criminal proceedings, or the institution of an action in rem for forfeiture of such fish, wildlife, property, or item pursuant to paragraph (4) of this subsection; except that the Secretary may, in lieu of holding such fish, wildlife, property, or item, permit the owner or con-

signee to post a bond or other surety satisfactory to the Secretary, but upon forfeiture of any such property to the United States, or the abandonment or waiver of any claim to any such property, it shall be disposed of (other than by sale to the general public) by the Secretary in such a manner, consistent with the purposes of this Act, as the Secretary shall by regulation prescribe.

(4)(A) All fish or wildlife or plants taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported contrary to the provisions of this Act, any regulation made pursuant thereto, or any permit or certificate issued hereunder shall be subject to forfeiture to the United States.

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

(5) All provisions of law relating to the seizure, forfeiture, and condemnation of a vessel for violation of the customs laws, the disposition of such vessel or the proceeds from the sale thereof, and the remission or mitigation of such forfeiture, shall apply to the seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this Act, insofar as such provisions of law are applicable and not inconsistent with the provisions of this Act; except that all powers, rights, and duties conferred or imposed by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this Act, be exercised or performed by the Secretary or by such persons as he may designate.

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

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

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

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

(B) to compel the Secretary to apply, pursuant to section 6(g)(2)(B)(ii) of this Act, the prohibitions set forth in or authorized pursuant to section 4(d) or section

9(a)(1)(B) of this Act with respect to the taking of any resident endangered species or threatened species within any State; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(h) Coordination With Other Laws.—The Secretary of Agriculture and the Secretary shall provide for appropriate coordination of the administration of this Act with the administration of the animal quarantine laws (as defined in section 2509(f) of the Food, Agriculture, Conservation, and Trade Act of 1990 (21 U.S.C. 136a(f)) and

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

ENDANGERED PLANTS

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

CONFORMING AMENDMENTS

SEC. 13. (a) Subsection 4(c) of the Act of October 15, 1966 (80 Stat. 928, 16 U.S.C. 668dd(c)), is further amended by revising the second sentence thereof to read as follows: "With the exception of endangered species and threatened species listed by the Secretary pursuant to section 4 of the Endangered Species Act of 1973 in States wherein a cooperative agreement does not exist pursuant to section 6(c) of that Act, nothing in this Act shall be construed to authorize the Secretary to control or regulate hunting or fishing of resident fish and wildlife on lands not within the system."

(b) Subsection 10(a) of the Migratory Bird Conservation Act (45 Stat. 1224, 16 U.S.C. 715i(a)), and subsection 401(a) of the Act of June 15, 1935 (49 Stat. 383, 16 U.S.C. 715s(a)), are each amended by striking out "threatened with extinction," and inserting in lieu thereof the following: "listed pursuant to section 4 of the Endangered Species Act of 1973 as endangered species or threatened species".

(c) Section 7(a)(1) of the Land and Water Conservation Fund Act of 1965 (16 U.S.C. 4601-9(a)(1)) is amended by striking out:

> "THREATENED SPECIES.—For any national area which may be authorized for the preservation of species of fish or wildlife that are threatened with extinction." and inserting in lieu thereof the following:
>
> "ENDANGERED SPECIES AND THREATENED SPECIES.—For lands, waters, or interests therein, the acquisition of which is authorized under section 5(a) of the Endangered Species Act of 1973, needed for the purpose of conserving endangered or threatened species of fish or wildlife or plants."

(d) The first sentence of section 2 of the Act of September 28, 1962, as amended (76 Stat. 653, 16 U.S.C. 460k-1), is amended to read as follows:

> "The Secretary is authorized to acquire areas of land, or interests therein, which are suitable for—

"(1) incidental fish and wildlife-oriented recreational development,

"(2) the protection of natural resources,

"(3) the conservation of endangered species or threatened species listed by the Secretary pursuant to section 4 of the Endangered Species Act of 1973, or

"(4) carrying out two or more of the purposes set forth in paragraphs (1) through (3) of this section, and are adjacent to, or within, the said conservation areas, except that the acquisition of any land or interest therein pursuant to this section shall be accomplished only with such funds as may be appropriated therefor by the Congress or donated for such purposes, but such property shall not be acquired with funds obtained from the sale of Federal migratory bird hunting stamps."

(e) The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 - 1407) is amended—

(1) by striking out "Endangered Species Conservation Act of 1969" in section 3(l)(B) thereof and inserting in lieu thereof the following: "Endangered Species Act of 1973";

(2) by striking out "pursuant to the Endangered Species Conservation Act of 1969" in section 101(a)(3)(B) thereof and inserting in lieu thereof the following: "or threatened species pursuant to the Endangered Species Act of 1973";

(3) by striking out "endangered under the Endangered Species Conservation Act of 1969" in section 102(b)(3) thereof and inserting in lieu thereof the following: "an endangered species or threatened species pursuant to the Endangered Species Act of 1973"; and

(4) by striking out "of the Interior such revisions of the Endangered Species List, authorized by the Endangered Species Conservation Act of 1969," in section 202(a)(6) thereof and inserting in lieu thereof the following: "such revisions of the endangered species list and threatened species list published pursuant to section 4(c)(1) of the Endangered Species Act of 1973".

(f) Section 2(1) of the Federal Environmental Pesticide Control Act of 1972 (Public Law 92-516) is amended by striking out the words "by the Secretary of the Interior under Public Law 91-135" and inserting in lieu thereof the words "or threatened by the Secretary pursuant to the Endangered Species Act of 1973".

REPEALER

SEC. 14. The Endangered Species Conservation Act of 1969 (sections 1 through 3 of the Act of October 15, 1966, and sections 1 through 6 of the Act of December 5, 1969; 16 U.S.C. 668aa—668cc-6), is repealed.

AUTHORIZATION OF APPROPRIATIONS

SEC. 15. (a) IN GENERAL.—Except as provided in subsections (b), (c), and (d), there are authorized to be appropriated—

(1) not to exceed $ 35,000,000 for fiscal year 1988, $ 36,500,000 for fiscal year 1989, $38,000,000 for fiscal year 1990, $ 39,500,000 for fiscal year 1991, and $ 41,500,000 for fiscal year 1992 to enable the Department of the Interior to carry out such functions and responsibilities as it may have been given under this Act;

(2) not to exceed $ 5,750,000 for fiscal year 1988, $ 6,250,000 for each of fiscal years 1989 and 1990, and $ 6,750,000 for each of fiscal years 1991 and 1992 to en-

able the Department of Commerce to carry out such functions and responsibilities as it may have been given under this Act; and

(3) not to exceed $ 2,200,000 for fiscal year 1988, $ 2,400,000 for each of fiscal years 1989 and 1990, and $ 2,600,000 for each of fiscal years 1991 and 1992, to enable the Department of Agriculture to carry out its functions and responsibilities with respect to the enforcement of this Act and the Convention which pertain to the importation or exportation of plants.

(b) EXEMPTIONS FROM ACT.—There are authorized to be appropriated to the Secretary to assist him and the Endangered Species Committee in carrying out their functions under sections 7(e), (g), and (h) not to exceed $ 600,000 for each of fiscal years 1988, 1989, 1990, 1991, and 1992.

(c) CONVENTION IMPLEMENTATION.—There are authorized to be appropriated to the Department of the Interior for purposes of carrying out section 8A(e) not to exceed $ 400,000 for each of fiscal years 1988, 1989, and 1990, and $ 500,000 for each of fiscal years 1991 and 1992, and such sums shall remain available until expended.

EFFECTIVE DATE

SEC. 16. This Act shall take effect on the date of its enactment.

MARINE MAMMAL PROTECTION ACT OF 1972

SEC. 17. Except as otherwise provided in this Act, no provision of this Act shall take precedence over any more restrictive conflicting provision of the Marine Mammal Protection Act of 1972.

ANNUAL COST ANALYSIS BY THE FISH AND WILDLIFE SERVICE

SEC. 18. Notwithstanding section 3003 of Public Law 104-66 (31 U.S.C. 1113 note; 109 Stat. 734), on or before January 15, 1990, and each January 15 thereafter, the Secretary of the Interior, acting through the Fish and Wildlife Service, shall submit to the Congress an annual report covering the preceding fiscal year which shall contain—

(1) an accounting on a species by species basis of all reasonably identifiable Federal expenditures made primarily for the conservation of endangered or threatened species pursuant to this Act; and

(2) an accounting on a species by species basis of all reasonably identifiable expenditures made primarily for the conservation of endangered or threatened species pursuant to this Act by States receiving grants under section 6.

Hawaiians wishing to engage directly in the NEPA process will have the opportunity to do so. As part of this process, we will protect the confidential nature of any consultations and other communications we have with tribes and Native Hawaiians to the extent authorized by law.

Public Scoping and Comments

See **DATES** for information about upcoming scoping webinars. Please note that the Service will ensure that the public scoping webinars will be accessible to members of the public with disabilities. A primary purpose of the scoping process is to receive suggestions and information on the scope of issues and alternatives to consider when drafting the environmental documents and to identify significant issues and reasonable alternatives related to the Service's proposed action. To ensure that we identify a range of issues and alternatives related to the proposed action, we invite comments and suggestions from all interested parties. We will conduct a review of this proposed action according to the requirements of NEPA and its regulations, other relevant Federal laws, regulations, policies, and guidance, and our procedures for compliance with applicable regulations.

We request information from interested government agencies, Native American tribes, Native Hawaiian Organizations, the scientific community, industry, nongovernmental organizations, and other interested parties. We solicit input on the following:

(1) The avoidance, minimization, and mitigation measures entities employed to address incidental take of migratory birds (prior to M-Opinion 37050);

(2) The direct costs associated with implementing these measures;

(3) The indirect costs that entities have incurred related to the legal risk of prosecution for incidental take of migratory birds (*e.g.,* legal fees, increased interest rates on financing, insurance, opportunity costs);

(4) The extent that avoidance, minimization, and mitigation measures continue to be used (after issuance of M-Opinion 37050);

(5) Any quantitative information regarding the economic benefits and/or ecosystem services (*e.g.,* pollination, pest control, etc.) provided by migratory birds;

(6) Information regarding resources that may be affected by the proposal; and

(7) Species having religious or cultural significance for tribes and Native Hawaiian Organizations, and species having cultural significance for the general public and impacts to cultural values from the actions being considered.

You may submit your comments and materials by one of the methods described above under **ADDRESSES**. Once the draft environmental documents are completed, we will offer further opportunities for public comment.

Public Availability of Comments

Written comments we receive become part of the public record associated with this action. Your address, phone number, email address, or other personal identifying information that you include in your comment may become publicly available. You may ask us to withhold your personal identifying information from public review, but we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Authority

The authorities for this action are the Migratory Bird Treaty Act (16 U.S.C. 703–712) and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

Dated: January 6, 2020.

Rob Wallace,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2020–01770 Filed 1–31–20; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 10

[Docket No. FWS–HQ–MB–2018–0090; FF09M29000–156–FXMB1232090BPP0]

RIN 1018–BD76

Regulations Governing Take of Migratory Birds

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS, Service, we), propose to adopt a regulation that defines the scope of the Migratory Bird Treaty Act (MBTA or Act) as it applies to conduct resulting in the injury or death of migratory birds protected by the Act. This proposed rule is consistent with the Solicitor's Opinion, M–37050, which concludes that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same, apply only to actions directed at migratory birds, their nests, or their eggs.

DATES: We will accept written comments on this proposed rule until March 19, 2020.

ADDRESSES: You may submit comments by either one of the following methods. Please do not submit comments by both.

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments to Docket No. FWS–HQ–MB–2018–0090.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–HQ–MB–2018–0090; U.S. Fish and Wildlife Service; MS: JAO/1N; 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We will not accept email or faxes. We will post all comments on *http://www.regulations.gov,* including any personal information you provide. See Public Comments, below, for more information.

FOR FURTHER INFORMATION CONTACT: Jerome Ford, Assistant Director, Migratory Birds, at 202–208–1050.

SUPPLEMENTARY INFORMATION:

Background

The Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703 *et seq.*) was enacted in 1918 to help fulfill the United States' obligations under the 1916 ''Convention between the United States and Great Britain for the protection of Migratory Birds.'' 39 Stat. 1702 (Aug. 16, 1916) (ratified Dec. 7, 1916) (Migratory Bird Treaty). The list of applicable migratory birds protected by the MBTA is currently codified in title 50 of the Code of Federal Regulations at 50 CFR 10.13.

In its current form, section 2(a) of the MBTA provides that, unless permitted by regulations, it is unlawful:

> at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof.

16 U.S.C. 703(a).

Section 3(a) of the MBTA authorizes and directs the Secretary of the Interior

to ''adopt suitable regulations'' allowing ''hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof'' while considering (''having due regard to'') temperature zones and ''distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds.'' 16 U.S.C. 704(a). Section 3(a) also requires the Secretary to ''determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions'' to adopt such regulations allowing these otherwise-prohibited activities. *Id.*

On December 22, 2017, the Principal Deputy Solicitor of the Department of the Interior, exercising the authority of the Solicitor pursuant to Secretary's Order 3345, issued a legal opinion, M–37050, ''The Migratory Bird Treaty Act Does Not Prohibit Incidental Take'' (M–37050 or M–Opinion). This opinion thoroughly examined the text, history, and purpose of the MBTA and concluded that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to actions that are directed at migratory birds, their nests, or their eggs. This opinion is consistent with the Fifth Circuit's recent decision in *United States* v. *CITGO Petroleum Corp.,* 801 F.3d 477 (5th Cir. 2015), which examined whether the MBTA prohibits incidental take. It also marked a change from prior U.S. Fish and Wildlife Service interpretations and an earlier Solicitor's Opinion, M–37041, ''Incidental Take Prohibited Under the Migratory Bird Treaty Act.'' The Office of the Solicitor performs the legal work for the Department of the Interior, including the U.S. Fish and Wildlife Service (hereafter ''Service''). The Service is the Federal agency delegated the primary responsibility for managing migratory birds.

This proposed rule addresses the Service's responsibilities under the MBTA. Consistent with M–37050, the Service proposes to adopt a regulation defining the scope of the MBTA's prohibitions to reach only actions directed at migratory birds, their nests, or their eggs.

Provisions of the Proposed Rule

Scope of the Migratory Bird Treaty Act

As a matter of both law and policy, the Service proposes to codify M–37050 in a regulation defining the scope of the MBTA. M–37050 is available on the internet at the Federal eRulemaking Portal: *http://www.regulations.gov* in Docket No. FWS–HQ–MB–2018–0090; and at *https://www.doi.gov/solicitor/opinions.*

As described in M–37050, the text and purpose of the MBTA indicate that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same only criminalize actions that are specifically directed at migratory birds, their nests, or their eggs.

The relevant portion of the MBTA reads, ''it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird, [or] any part, nest, or egg of any such bird.'' 16 U.S.C. 703(a). Of the five referenced verbs, three—pursue, hunt, and capture—unambiguously require an action that is directed at migratory birds, nests, or eggs. To wit, according to the entry for each word in a contemporary dictionary:

- Pursue means ''[t]o follow with a view to overtake; to follow eagerly, or with haste; to chase.'' *Webster's Revised Unabridged Dictionary* 1166 (1913);
- Hunt means ''[t]o search for or follow after, as game or wild animals; to chase; to pursue for the purpose of catching or killing.'' *Id.* at 713; and
- Capture means ''[t]o seize or take possession of by force, surprise, or stratagem; to overcome and hold; to secure by effort.'' *Id.* at 215.

Thus, one does not passively or accidentally pursue, hunt, or capture. Rather, each requires a deliberate action specifically directed at achieving a goal.

By contrast, the verbs ''kill'' and ''take'' could refer to active or passive conduct, depending on the context. *See id.* at 813 (''kill'' may mean the more active ''to put to death; to slay'' or serve as the general term for depriving of life); *id.* at 1469 (''take'' has many definitions, including the more passive ''[t]o receive into one's hold, possession, etc., by a voluntary act'' or the more active ''[t]o lay hold of, as in grasping, seizing, catching, capturing, adhering to, or the like; grasp; seize;—implying or suggesting the use of physical force'').

Any ambiguity inherent in the statute's use of the terms ''take'' and ''kill'' is resolved by applying established rules of statutory construction. First and foremost, when any words ''are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar.'' Antonin Scalia & Bryan A. Garner, Reading the Law: The interpretation of Legal Texts, 195 (2012); *see also Third Nat'l Bank* v. *Impac, Ltd.,* 432 U.S. 312, 321 (1977) (''As always, '[t]he meaning of particular phrases must be determined in context' . . . .'' (quoting *SEC* v. *Nat'l Sec., Inc.,* 393 U.S. 453, 466 (1969)); *Beecham* v. *United States,* 511 U.S. 368, 371 (1994) (the fact that ''several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well''). Section 2 of the MBTA groups together five verbs—''pursue,'' ''hunt,'' ''take,'' ''capture,'' and ''kill.'' Accordingly, the statutory construction canon of *noscitur a sociis* (''it is known by its associates'') counsels in favor of reading each verb to have a related meaning. *See Scalia & Garner* at 195 (''The canon especially holds that 'words grouped in a list should be given related meanings.' '' (quoting *Third Nat'l Bank,* 432 U.S. at 322)).

Thus, when read together with the other active verbs in section 2 of the MBTA, the proper meaning is evident. The operative verbs (''pursue, hunt, take, capture, kill'') ''are all affirmative acts . . . which are directed immediately and intentionally against a particular animal—not acts or omissions that indirectly and accidentally cause injury to a population of animals.'' *Sweet Home,* 515 U.S. at 719–20 (Scalia, J., dissenting) (agreeing with the majority opinion that certain terms in the definition of the term ''take'' in the Endangered Species Act (ESA)—identical to the other prohibited acts referenced in the MBTA—refer to deliberate actions, while disagreeing that the use of the additional definitional term ''harm''—used only in the ESA—meant that ''take'' should be read more broadly to include actions not deliberately directed at covered species); *see also United States* v. *CITGO Petroleum Corp.,* 801 F.3d 477, 489 n.10 (5th Cir. 2015) (''Even if 'kill' does have independent meaning [from 'take'], the Supreme Court, interpreting a similar list in the [Endangered Species Act], concluded that the terms pursue, hunt, shoot, wound, kill, trap, capture, and collect, generally refer to deliberate actions''); *cf. Sweet Home,* 515 U.S. at 698 n.11 (Congress's decision to specifically define ''take'' in the ESA obviated the need to define its common-law meaning).

Accordingly, it is reasonable to conclude that the MBTA's prohibition on killing is similarly limited to deliberate acts that result in bird deaths. *See Newton County Wildlife Ass'n* v. *U.S. Forest Serv.,* 113 F.3d 110, 115 (8th Cir. 1997) (''MBTA's plain language prohibits conduct directed at migratory birds . . . . [T]he ambiguous terms 'take' and 'kill' in 16 U.S.C. 703 mean 'physical conduct of the sort engaged in by hunters and poachers . . . .' ''

(quoting *Seattle Audubon Soc'y* v. *Evans,* 952 F.2d 297, 302 (9th Cir. 1991))); *United States* v. *Brigham Oil & Gas,* 840 F. Supp. 2d 1202, 1208 (D.N.D. 2012) (''In the context of the Act, 'take' refers to conduct directed at birds, such as hunting and poaching, and not acts or omissions having merely the incidental or unintended effect of causing bird deaths''). This conclusion is also supported by the U.S. Fish and Wildlife Service's implementing regulations, which define ''take'' to mean ''to pursue, hunt, shoot, wound, kill, trap, capture, or collect'' or attempt to do the same. 50 CFR 10.12. The component actions of ''take'' involve direct and purposeful actions to reduce animals to human control. As such, they ''reinforce [ ] the dictionary definition, and confirm [ ] that 'take' does not refer to accidental activity or the unintended results of other conduct.'' *Brigham Oil & Gas,* 840 F. Supp. 2d at 1209. This interpretation does not render the words ''take'' and ''kill'' redundant since each has its own discrete definition; indeed, one can hunt or pursue an animal without either killing it or taking it under the definitions relevant at the time the MBTA was enacted.

Furthermore, the notion that ''take'' refers to an action directed immediately against a particular animal is supported by the use of the word ''take'' in the common law. As the Supreme Court has instructed, ''absent contrary indications, Congress intends to adopt the common law definition of statutory terms.'' *United States* v. *Shabani,* 513 U.S. 10, 13 (1994). As Justice Scalia noted, ''the term ['take'] is as old as the law itself.'' *Sweet Home,* 515 U.S. at 717 (Scalia, J., dissenting). For example, the Digest of Justinian places ''take'' squarely in the context of acquiring dominion over wild animals, stating:

> [A]ll the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them. . . . Because that which belongs to nobody is acquired by the natural law by the person who first possesses it. We do not distinguish the acquisition of these wild beasts and birds by whether one has captured them on his own property [or] on the property of another; but he who wishes to enter into the property of another to hunt can be readily prevented if the owner knows his purpose to do so.

Geer v. *Connecticut,* 161 U.S. 519, 523 (1896) (quoting Digest, Book 41, Tit. 1, De Adquir. Rer. Dom.). Likewise, Blackstone's Commentaries provide:

> A man may lastly have a qualified property in animals *feroe naturoe, propter privilegium,* that is, he may have the privilege of hunting, taking and killing them in exclusion of other persons. Here he has a transient property in these animals usually called game so long as they continue within his liberty, and may restrain any stranger from taking them therein; but the instant they depart into another liberty, this qualified property ceases.

Id. at 526–27 (1896) (quoting 2 Blackstone Commentary 410). Thus, under common law ''[t]o 'take,' when applied to wild animals, means to reduce those animals, by killing or capturing, to human control.'' *Sweet Home,* 515 U.S. at 717 (Scalia, J., dissenting); *see also CITGO,* 801 F.3d at 489 (''Justice Scalia's discussion of 'take' as used in the Endangered Species Act is not challenged here by the government . . . because Congress gave 'take' a broader meaning for that statute.''). As is the case with the ESA, in the MBTA, ''[t]he taking prohibition is only part of the regulatory plan . . ., which covers all stages of the process by which protected wildlife is reduced to man's dominion and made the object of profit,'' and, as such, is ''a term of art deeply embedded in the statutory and common law concerning wildlife'' that ''describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals).'' *Sweet Home,* 515 U.S. at 718 (Scalia, J., dissenting). The common-law meaning of the term ''take'' is particularly important here because, unlike the ESA, which specifically defines the term ''take,'' the MBTA does not define ''take''—instead it includes the term in a list of similar actions. Thus, the *Sweet Home* majority's ultimate conclusion that Congress's decision to define ''take'' in the ESA obviated the need to divine its common-law meaning is inapplicable here. *See id.* at 697, n.10. Instead, the opposite is true.

A number of courts, as well as the prior M-Opinion, have focused on the MBTA's direction that a prohibited act can occur ''at any time, by any means, in any manner'' to support the conclusion that the statute prohibits any activity that results in the death of a bird, which would necessarily include incidental take. However, the quoted statutory language does not change the nature of those prohibited acts and simply clarifies that activities directed at migratory birds, such as hunting and poaching, are prohibited whenever and wherever they occur and whatever manner is applied, be it a shotgun, a bow, or some other creative approach to deliberately taking birds. *See generally CITGO,* 801 F.3d at 490 (''The addition of adverbial phrases connoting 'means' and 'manner,' however, does not serve to transform the nature of the activities themselves. For instance, the manner and means of hunting may differ from bowhunting to rifles, shotguns, and air rifles, but hunting is still a deliberately conducted activity. Likewise, rendering all-inclusive the manner and means of 'taking' migratory birds does not change what 'take' means, it merely modifies the mode of take.'').

In reaching a contrary conclusion, Opinion M–37041 assumed that because section 703 of the MBTA is a strict-liability provision, meaning that no *mens rea* or criminal intent is required for a violation to have taken place, *any* act that takes or kills a bird must be covered as long as the act results in the death of a bird. In making that assumption, M–37041 improperly ignored the meaning and context of the actual acts prohibited by the statute. Instead, the opinion presumed that the lack of a mental state requirement for a misdemeanor violation of the MBTA equated to reading the prohibited acts ''kill'' and ''take'' as broadly applying to actions not specifically directed at migratory birds, so long as the result was their death or injury. But the relevant acts prohibited by the MBTA are voluntary acts directed at reducing an animal to human control, such as when a hunter shoots a protected bird causing its death. The key remains that the actor was engaged in an activity the object of which was to render a bird subject to human control.

By contrast, liability fails to attach to actions that are not directed toward rendering an animal subject to human control. Common examples of such actions include: driving a car, allowing a pet cat to roam outdoors, or erecting a windowed building. All of these actions could foreseeably result in the deaths of protected birds, and all would be violations of the MBTA under the now-withdrawn M-Opinion if they did in fact result in deaths of protected birds, yet none of these actions have as their object rendering any animal subject to human control. Because, under the present interpretation, no ''take'' has occurred within the meaning of the MBTA, the strict-liability provisions of the Act would not be triggered.

The prior M-Opinion posited that amendments to the MBTA imposing mental state requirements for certain specific offenses were only necessary if no mental state is otherwise required. But the conclusion that the taking and killing of migratory birds is a strict-liability crime does not answer the separate question of what acts are criminalized under the statute. The Fifth Circuit agreed in *CITGO,* stating ''we disagree that because misdemeanor

MBTA violations are strict liability crimes, a 'take' includes acts (or omissions) that indirectly or accidentally kill migratory birds.'' The court goes on to note that ''[a] person whose car accidentally collided with the bird . . . has committed no act 'taking' the bird for which he could be held strictly liable. Nor do the owners of electrical lines 'take' migratory birds who run into them. These distinctions are inherent in the nature of the word 'taking' and reveal the strict liability argument as a non-sequitur.'' 801 F.3d at 493. Similarly, in *Mahler* v. *U.S. Forest Serv.,* 927 F. Supp. 1559 (S.D. Ind. 1996), the court described the interplay between activities that are specifically directed at birds and the strict liability standard of the MBTA:

> [A comment in the legislative history] in favor of strict liability does not show any intention on the part of Congress to extend the scope of the MBTA beyond hunting, trapping, poaching, and trading in birds and bird parts to reach any and all human activity that might cause the death of a migratory bird. Those who engage in such activity and who accidentally kill a protected migratory bird or who violate the limits on their permits may be charged with misdemeanors without proof of intent to kill a *protected* bird or intent to violate the terms of a permit. That does not mean, however, that Congress intended for ''strict liability'' to apply to all forms of human activity, such as cutting a tree, mowing a hayfield, or flying a plane. The 1986 amendment and corresponding legislative history reveal only an intention to close a loophole that might prevent felony prosecutions for commercial trafficking in migratory birds and their parts.
>
> Thus, there appears to be no explicit basis in the language or the development of the MBTA for concluding that it was intended to be applied to any and all human activity that causes even unintentional deaths of migratory birds.

927 F. Supp. at 1581 (referencing S. Rep. No. 99–445, at 16 (1986), *reprinted* in 1986 U.S.C.C.A.N. 6113, 6128). Thus, limiting the range of actions prohibited by the MBTA to those that are directed at migratory birds will focus prosecutions on activities like hunting and trapping and exclude more attenuated conduct, such as lawful commercial activity, that unintentionally and indirectly results in the death of migratory birds.

The History of the MBTA

The history of the MBTA and the debate surrounding its adoption illustrate that the Act was part of Congress's efforts to regulate the hunting of migratory birds in direct response to the extreme over-hunting, largely for commercial purposes, that had occurred over the years. *See United States* v. *Moon Lake Electric Ass'n,* 45 F. Supp. 2d 1070, 1080 (D. Colo. 1999) (''the MBTA's legislative history indicates that Congress intended to regulate recreational and commercial hunting''); *Mahler,* 927 F. Supp. at 1574 (''The MBTA was designed to forestall hunting of migratory birds and the sale of their parts''). Testimony concerning the MBTA given by the Solicitor's Office for the Department of Agriculture underscores this focus:

> We people down here hunt [migratory birds]. The Canadians reasonably want some assurances from the United States that if they let those birds rear their young up there and come down here, we will preserve a sufficient supply to permit them to go back there.

Protection of Migratory Birds: Hearing on H.R. 20080 Before the House Comm. on Foreign Affairs, 64th Cong. 22–23 (1917) (statement of R.W. Williams, Solicitor's Office, Department of Agriculture). Likewise, the Chief of the Department of Agriculture's Bureau of Biological Survey noted that he ''ha[s] always had the idea that [passenger pigeons] were destroyed by overhunting, being killed for food and for sport.'' *Protection of Migratory Birds: Hearing on H.R. 20080 Before the House Comm. on Foreign Affairs,* 64th Cong. 11 (1917) (statement of E. W. Nelson, Chief Bureau of Biological Survey, Department of Agriculture).

Statements from individual Congressmen evince a similar focus on hunting. Senator Smith, ''who introduced and championed the Act . . . in the Senate,'' *Leaders in Recent Successful Fight for the Migratory Bird Treaty Act,* Bulletin—The American Game Protective Association, July 1918, at 5, explained:

> Nobody is trying to do anything here except to keep pothunters from killing game out of season, ruining the eggs of nesting birds, and ruining the country by it. Enough birds will keep every insect off of every tree in America, and if you will quit shooting them they will do it.

55 Cong. Rec. 4816 (statement of Sen. Smith) (1917). Likewise, during hearings of the House Foreign Affairs Committee, Congressman Miller, a ''vigorous fighter, who distinguished himself in the debate'' over the MBTA, *Leaders in Recent Successful Fight for the Migratory Bird Treaty Act, Bulletin—The American Game Protective Association,* July 1918, at 5, put the MBTA squarely in the context of hunting:

> I want to assure you . . . that I am heartily in sympathy with this legislation. I want it to go through, because I am up there every fall, and I know what the trouble is. The trouble is in shooting the ducks in Louisiana, Arkansas, and Texas in the summer time, and also killing them when they are nesting up in Canada.

Protection of Migratory Birds: Hearing on H.R. 20080 Before the House Comm. on Foreign Affairs, 64th Cong. 7 (1917) (statement of Rep. Miller).

In seeking to take a broader view of congressional purpose, the *Moon Lake* court looked to other contemporary statements that cited the destruction of habitat, along with improvements in firearms, as a cause of the decline in migratory bird populations. The court even suggested that these statements, which ''anticipated application of the MBTA to children who act 'through inadvertence' or 'through accident,' '' supported a broader reading of the legislative history. *Moon Lake,* 45 F. Supp. 2d at 1080–81. Upon closer examination, these statements are instead consistent with a limited reading of the MBTA.

One such contemporary statement cited by the court is a letter from Secretary of State Robert Lansing to the President attributing the decrease in migratory bird populations to two general issues:

- Habitat destruction, described generally as ''the extension of agriculture, and particularly the draining on a large scale of swamps and meadows;'' and
- Hunting, described in terms of ''improved firearms and a vast increase in the number of sportsmen.''

These statements were referenced by Representative Baker during the House floor debate over the MBTA, implying that the MBTA was intended to address both issues. *Moon Lake,* 45 F. Supp. 2d at 1080–81 (quoting H. Rep. No. 65–243, at 2 (1918) (letter from Secretary of State Robert Lansing to the President)). However, Congress addressed hunting and habitat destruction in the context of the Migratory Bird Treaty through two separate acts:

- First, in 1918, Congress adopted the MBTA to address the direct and intentional killing of migratory birds;
- Second, in 1929, Congress adopted the Migratory Bird Conservation Act to ''more effectively'' implement the Migratory Bird Treaty by protecting certain migratory bird habitats.

The Migratory Bird Conservation Act provided the authority to purchase or rent land for the conservation of migratory birds, including for the establishment of inviolate ''sanctuaries'' wherein migratory bird habitats would be protected from persons ''cut[ting], burn[ing], or destroy[ing] any timber, grass, or other natural growth.'' Migratory Bird Conservation Act, section 10, 45 Stat. 1222, 1224 (1929)

(codified as amended at 16 U.S.C. 715–715s). If the MBTA was originally understood to protect migratory bird habitats from incidental destruction, enactment of the Migratory Bird Conservation Act eleven years later would have been largely superfluous. Instead, the MBTA and the Migratory Bird Conservation Act are complementary: ''Together, the Treaty Act in regulating hunting and possession and the Conservation Act by establishing sanctuaries and preserving natural waterfowl habitat help implement our national commitment to the protection of migratory birds.'' *United States* v. *North Dakota,* 650 F.2d 911, 913–14 (8th Cir. 1981), *aff'd on other grounds,* 460 U.S. 300 (1983).

Some courts have attempted to interpret a number of floor statements as supporting the notion that Congress intended the MBTA to regulate more than just hunting and poaching, but those statements reflect an intention to prohibit actions directed at birds—whether accomplished through hunting or some other means intended to directly kill birds. For example, some Members ''anticipated application of the MBTA to children who act 'through inadvertence' or 'through accident.' ''

> What are you going to do in a case like this: A barefoot boy, as barefoot boys sometimes do, largely through inadvertence and without meaning anything wrong, happens to throw a stone at and strikes and injures a robin's nest and breaks one of the eggs, whereupon he is hauled before a court for violation of a solemn treaty entered into between the United States of America and the Provinces of Canada.

Moon Lake, 45 F. Supp. 2d at 1081 (quoting 56 Cong. Rec. 7455 (1918) (statement of Rep. Mondell)). ''[I]nadvertence'' in this statement refers to the boy's *mens rea.* As the rest of the sentence clarifies, the hypothetical boy acted ''without *meaning* anything wrong,'' not that he acted unintentionally or accidentally in damaging the robin's nest. This is reinforced by the rest of the hypothetical, which posits that the boy threw ''a stone *at* and strikes and injures a robin's nest.'' The underlying act is directed specifically at the robin's nest. In other statements various members of Congress expressed concern about ''sportsmen,'' people ''killing'' birds, ''shooting'' of game birds or ''destruction'' of insectivorous birds, and whether the purpose of the MBTA was to favor a steady supply of ''game animals for the upper classes.'' *Moon Lake,* 45 F. Supp. 2d at 1080–81. One Member of Congress even offered a statement that explains why the statute is not redundant in its use of the various terms to explain what activities are regulated: ''[T]hey cannot hunt ducks in Indiana in the fall, because they cannot kill them. I have never been able to see why you cannot hunt, whether you kill or not. There is no embargo on hunting, at least down in South Carolina . . . .'' *Id.* at 1081 (quoting 56 Cong. Rec. 7446 (1918) (statement of Rep. Stevenson)). That Congress was animated regarding potential restrictions on hunting and its impact on individual hunters is evident from even the statements relied upon as support for the conclusion that the statute reaches incidental take.

Finally, in 1918, Federal regulation of the hunting of wild birds was a highly controversial and legally fraught subject. For example, on the floor of the Senate, Senator Reed proclaimed:

> I am opposed not only now in reference to this bill [the MBTA], but I am opposed as a general proposition to conferring power of that kind upon an agent of the Government. . . .
>
> . . . Section 3 proposes to turn these powers over to the Secretary of Agriculture . . . to make it a crime for a man to shoot game on his own farm or to make it perfectly legal to shoot it on his own farm . . . .
>
> When a Secretary of Agriculture does a thing of that kind I have no hesitancy in saying that he is doing a thing that is utterly indefensible, and that the Secretary of Agriculture who does it ought to be driven from office . . . .

55 Cong. Rec. 4813 (1917) (statement of Sen. Reed).

Federal regulation of hunting was also legally tenuous at that time. Whether the Federal Government had any authority to regulate the killing or taking of any wild animal was an open question in 1918. Just over 20 years earlier, the Supreme Court in *Geer* had ruled that the States exercised the power of ownership over wild game in trust, implicitly precluding Federal regulation. *See Geer* v. *Connecticut,* 161 U.S. 519 (1896). When Congress did attempt to assert a degree of Federal jurisdiction over wild game with the 1913 Weeks-McLean Law, it was met with mixed results in the courts, leaving the question pending before the Supreme Court at the time of the MBTA's enactment. *See, e.g., United States* v. *Shaver,* 214 F. 154, 160 (E.D. Ark. 1914); *United States* v. *McCullagh,* 221 F. 288 (D. Kan. 1915). It was not until *Missouri* v. *Holland* in 1920 that the Court, relying on authority derived from the Migratory Bird Treaty (Canada Convention) under the Treaty Clause of the U.S. Constitution, definitively acknowledged the Federal Government's ability to regulate the taking of wild birds. 252 U.S. 416, 432–33 (1920).

Given the legal uncertainty and political controversy surrounding Federal regulation of intentional hunting in 1918, it is highly unlikely that Congress intended to confer authority upon the executive branch to prohibit all manner of activity that had an incidental impact on migratory birds.

The provisions of the 1916 Canada Convention provide support for this conclusion by authorizing only certain circumscribed activities specifically directed at migratory birds. The Convention authorizes hunting only during prescribed open seasons, and take at any time for other limited purposes such as scientific use, propagation, or to resolve conflicts under extraordinary conditions when birds become seriously injurious to agricultural or other interests. *See* Canada Convention, Art. II–VII, 39 Stat. 1702.

Subsequent legislative history does not undermine a limited interpretation of the MBTA, as enacted in 1918. The ''fixed-meaning canon of statutory construction directs that ''[w]ords must be given the meaning they had when the text was adopted.'' Scalia & Garner at 78. The meaning of written instruments ''does not alter. That which it meant when adopted, it means now.'' *South Carolina* v. *United States,* 199 U.S. 437, 448 (1905).

The operative language in section 2 of the MBTA has changed little since its adoption in 1918. The current iteration of the relevant language—making it unlawful for persons ''at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess'' specific migratory birds—was adopted in 1935 as part of the Mexico Treaty Act and has remained unchanged since then. *Compare* Mexico Treaty Act, 49 Stat. 1555, section 3 *with* 16 U.S.C. 703(a). As with the 1916 Canada Convention, the Mexico Convention focused primarily on hunting and establishing protections for birds in the context of take and possession for commercial use. *See* Convention between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, 50 Stat. 1311 (Feb. 7, 1936) (Mexico Convention). Subsequent Protocols amending both these Conventions also did not explicitly address incidental take or otherwise broaden their scope to prohibit anything other than purposeful take of migratory birds. *See* Protocol between the Government of the United States and the Government of Canada Amending the 1916 Convention between the United Kingdom and the United States of America for the protection of

Migratory Birds, Sen. Treaty Doc. 104–28 (Dec. 14, 1995) (outlining conservation principles to ensure long-term conservation of migratory birds, amending closed seasons, and authorizing indigenous groups to harvest migratory birds and eggs throughout the year for subsistence purposes); Protocol between the Government of the United States of America and the Government of the United Mexican States Amending the Convention for Protection of Migratory Birds and Game Mammals, Sen. Treaty Doc. 105–26 (May 5, 1997) (authorizing indigenous groups to harvest migratory birds and eggs throughout the year for subsistence purposes).

It was not until more than 50 years after the initial adoption of the MBTA and 25 years after the Mexico Treaty Act that Federal prosecutors began applying the MBTA to incidental actions. *See* Lilley & Firestone at 1181 (''In the early 1970s, *United States* v. *Union Texas Petroleum* [No. 73–CR–127 (D. Colo. Jul. 11, 1973)] marked the first case dealing with the issue of incidental take.''). This newfound Federal authority was not accompanied by any corresponding legislative change. The only contemporaneous changes to section 2 of the MBTA were technical updates recognizing the adoption of a treaty with Japan. *See* Act of June 1, 1974, Public Law 93–300, 88 Stat. 190. Implementing legislation for the treaty with the Soviet Union also did not amend section 2. *See* Fish and Wildlife Improvement Act of 1978, Public Law 95–616, sec. 3(h), 92 Stat. 3110. Similar to the earlier Conventions, the provisions of the Japan and Russia Conventions authorized purposeful take for specific activities such as hunting, scientific, educational and propagation purposes, and protection against injury to persons and property. However, they also outlined mechanisms to protect habitat and prevent damage from pollution and other environmental degradation (domestically implemented by the Migratory Bird Conservation Act and other applicable Federal laws). *See* Convention between the Government of the United States and the Government of Japan for the Protection of Migratory birds and Birds in Danger of Extinction, and their Environment, 25 U.S.T. 3329, T.I.A.S. No. 7990 (Mar. 4, 1972) (Japan Convention); Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and their Environment, T.I.A.S. No. 9073 (Nov. 19, 1976) (Russia Convention).

No changes were made to the section of the MBTA at issue here following the later conventions except that the Act was modified to include references to these later agreements. Certainly other Federal laws may require consideration of potential impacts to birds and their habitat in a way that furthers the goals of the Conventions' broad statements. *See, e.g., Mahler,* 927 F. Supp. at 1581 (''Many other statutes enacted in the intervening years also counsel against reading the MBTA to prohibit any and all migratory bird deaths resulting from logging activities in national forests. As is apparent from the record in this case, the Forest Service must comply with a myriad of statutory and regulatory requirements to authorize even the very modest type of salvage logging operation of a few acres of dead and dying trees at issue in this case. Those laws require the Forest Service to manage national forests so as to balance many competing goals, including timber production, biodiversity, protection of endangered and threatened species, human recreation, aesthetic concerns, and many others.''). Given the overwhelming evidence that the primary purpose of section 2, as amended by the Mexico Treaty Act, was to control over-hunting, the references to the later agreements do not bear the weight of the conclusion reached by the prior Opinion (M–37041).

Thus, the only legislative enactment concerning incidental activity under the MBTA is the 2003 appropriations bill that explicitly exempted military-readiness activities from liability under the MBTA for incidental takings. *See* Bob Stump National Defense Authorization Act for Fiscal Year 2003, Public Law 107–314, Div. A, Title III, section 315, 116 Stat. 2509 (2002), *reprinted in* 16 U.S.C.A. 703, Historical and Statutory Notes. There is nothing in this legislation that authorizes the government to pursue incidental takings charges in other contexts. Rather, some have ''argue[d] that Congress expanded the definition of 'take' by negative implication'' since ''[t]he exemption did not extend to the 'operation of industrial facilities,' even though the government had previously prosecuted activities that indirectly affect birds.'' *CITGO,* 801 F.3d at 490–91.

This argument is contrary to the Court's admonition that ''Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'' *Whitman* v. *Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001). As the Fifth Circuit explained, ''[a] single carve-out from the law cannot mean that the entire coverage of the MBTA was implicitly and hugely expanded.'' *CITGO,* 801 F.3d at 491. Rather, it appears Congress acted in a limited fashion to preempt a specific and immediate impediment to military-readiness activities. ''Whether Congress deliberately avoided more broadly changing the MBTA or simply chose to address a discrete problem, the most that can be said is that Congress did no more than the plain text of the amendment means.'' *Id.* It did not hide the elephant of incidental takings in the mouse hole of a narrow appropriations provision.

Constitutional Issues

The Supreme Court has recognized that ''[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.'' *FCC* v. *Fox Television Stations, Inc.,* 567 U.S. 239, 253 (2012). ''No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'' *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453 (1939). Accordingly, a ''statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'' *Fox Television,* 567 U.S. at 253 (quoting *Connally* v. *General Constr. Co.,* 269 U.S. 385, 391 (1926)). Thus, ''[a] conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.''' *Id.* (quoting *United States* v. *Williams,* 553 U.S. 285, 304 (2008)).

Assuming, *arguendo,* that the MBTA is ambiguous, the interpretation that limits its application to conduct that is specifically directed at birds is necessary to avoid potential constitutional concerns. As the Court has advised, ''where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'' *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988). Here, an attempt to impose liability for acts that are not directed at migratory birds raises just such constitutional concerns.

The ''scope of liability'' under an interpretation of the MBTA that extends criminal liability to all persons who kill or take migratory birds incidental to another activity is ''hard to overstate,''

CITGO, 801 F.3d at 493, and ''offers unlimited potential for criminal prosecutions.'' *Brigham Oil,* 840 F. Supp. 2d at 1213. ''The list of birds now protected as 'migratory birds' under the MBTA is a long one, including many of the most numerous and least endangered species one can imagine.'' *Mahler,* 927 F. Supp. at 1576. Currently, over 1,000 species of birds—including ''all species native to the United States or its territories''—are protected by the MBTA. 78 FR 65,844, 65,845 (Nov. 1, 2013); *see also* 50 CFR 10.13 (list of protected migratory birds); Migratory Bird Permits; Programmatic Environmental Impact Statement, 80 FR 30032, 30033 (May 26, 2015) (''Of the 1,027 currently protected species, approximately 8% are either listed (in whole or in part) as threatened or endangered under the Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*) and 25% are designated (in whole or in part) as Birds of Conservation Concern (BCC).''). Service analysis indicates that the top threats to birds are:

- Cats, which kill an estimated 2.4 billion birds per year;
- Collisions with building glass, which kill an estimated 599 million birds per year;
- Collisions with vehicles, which kill an estimated 214.5 million birds per year;
- Chemical poisoning (*e.g.,* pesticides and other toxins), which kill an estimated 72 million birds per year;
- Collisions with electrical lines, which kill an estimated 25.5 million birds per year;
- Collisions with communications towers, which kill an estimated 6.6 million birds per year;
- Electrocutions, which kill an estimated 5.6 million birds per year;
- Oil pits, which kill an estimated 750 thousand birds per year; and
- Collisions with wind turbines, which kill an estimated 234 thousand birds per year.

U.S. Fish and Wildlife Service, Threats to Birds: Migratory Birds Mortality—Questions and Answers, *available at https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php* (last updated September 14, 2018).

Interpreting the MBTA to apply strict criminal liability to any instance where a migratory bird is killed as a result of these threats would certainly be a clear and understandable rule. *See United States* v. *Apollo Energies, Inc.,* 611 F.3d 679, 689 (10th Cir. 2010) (concluding that under an incidental take interpretation, ''[t]he actions criminalized by the MBTA may be legion, but they are not vague''). But it would also turn the majority of Americans into potential criminals. *See Mahler,* 927 F. Supp. 1577–78 (listing a litany of scenarios where normal everyday actions could potentially and incidentally lead to the death of a single bird or breaking of an egg in a nest)). Such an interpretation could lead to absurd results, which are to be avoided. *See Griffin* v. *Oceanic Contractors,* 458 U.S. 564, 575 (1982) (''interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available''); *see also K Mart Corp.* v. *Cartier,* 486 U.S. 281, 324 n.2 (1988) (Scalia, J. concurring in part and dissenting in part) (''it is a venerable principle that a law will not be interpreted to produce absurd results.'').

These potentially absurd results are not ameliorated by limiting the definition of ''incidental take'' to ''direct and foreseeable'' harm as some courts have suggested. *See* U.S. Fish and Wildlife Service Manual, part 720, ch. 3, *Incidental Take Prohibited Under the Migratory Bird Treaty Act* (Jan. 11, 2017). The court in *Moon Lake* identified an ''important and inherent limiting feature of the MBTA's misdemeanor provision: To obtain a guilty verdict . . ., the government must prove proximate causation.'' *Moon Lake,* 45 F. Supp. 2d at 1085. Quoting Black's Law Dictionary, the court defines proximate cause as ''that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the accident could not have happened, if the injury be one which might be *reasonably anticipated or foreseen as a natural consequence of the wrongful act.*'' *Id.* (quoting Black's Law Dictionary 1225 (6th ed. 1990)) (emphasis in original). The Tenth Circuit in *Apollo Energies* took a similar approach, holding ''the MBTA requires a defendant to proximately cause the statute's violation for the statute to pass constitutional muster'' and quoting from Black's Law Dictionary to define ''proximate cause.'' *Apollo Energies,* 611 F.3d at 690.

Contrary to the suggestion of the courts in *Moon Lake* and *Apollo Energies* that principles of proximate causation can be read into the statute to define and limit the scope of incidental take, the death of birds as a result of activities such as driving, flying, or maintaining buildings with large windows is a ''direct,'' ''reasonably anticipated,'' and ''probable'' consequence of those actions. As discussed above, collisions with buildings and cars are the second and third most common human-caused threat to birds, killing an estimated 599 million and 214.5 million birds per year, respectively. It is eminently foreseeable and probable that cars and windows will kill birds. Thus, limiting incidental take to direct and foreseeable results does little to prevent absurd outcomes.

To avoid these absurd results, the government has historically relied on prosecutorial discretion. *See* Ogden at 29 (''Historically, the limiting mechanism on the prosecution of incidental taking under the MBTA by non-federal persons has been the exercise of prosecutorial discretion by the FWS.''); *see generally FMC,* 572 F.2d at 905 (situations ''such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings . . . properly can be left to the sound discretion of prosecutors and the courts''). Yet, the Supreme Court has declared ''[i]t will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions.'' *Baggett* v. *Bullitt,* 377 U.S. 360, 373 (1964); *see also Mahler,* 927 F. Supp. 1582 (''Such trust in prosecutorial discretion is not really an answer to the issue of statutory construction'' in interpreting the MBTA.). For broad statutes that may be applied to seemingly minor or absurd situations, ''[i]t is no answer to say that the statute would not be applied in such a case.'' *Keyishian* v. *Bd. of Regents,* 385 U.S. 589, 599 (1967).

Recognizing the challenge posed by relying upon prosecutorial discretion, the *FMC* court sought to avoid absurd results by limiting its holding to ''extrahazardous activities.'' *FMC,* 572 F.2d at 907. The term ''extrahazardous activities'' is not found anywhere in the statute, and is not defined by either the court or the Service. *See Mahler,* 927 F. Supp. at 1583 n.9 (noting that the *FMC* court's ''limiting principle . . . of strict liability for hazardous commercial activity . . . ha[s] no apparent basis in the statute itself or in the prior history of the MBTA's application since its enactment''); *cf. United States* v. *Rollins,* 706 F. Supp. 742, 744–45 (D. Idaho 1989) (''The statute itself does not state that poisoning of migratory birds by pesticide constitutes a criminal violation. Such specificity would not have been difficult to draft into the statute''). Thus, it is unclear what activities are ''extrahazardous.'' In *FMC,* the concept was applied to the

manufacture of ''toxic chemicals,'' *i.e.,* pesticides. But the court was silent as to how far this rule extends, even in the relatively narrow context of pesticides.

This type of uncertainty could be problematic under the Supreme Court's due process jurisprudence. *See Rollins,* 706 F. Supp. at 745 (dismissing charges against a farmer who applied pesticides to his fields that killed a flock of geese, reasoning ''[f]armers have a right to know what conduct of theirs is criminal, especially where that conduct consists of common farming practices carried on for many years in the community. While statutes do not have to be drafted with 'mathematical certainty,' they must be drafted with a 'reasonable degree of certainty.' The MBTA fails this test. . . . Under the facts of this case, the MBTA does not give 'fair notice as to what constitutes illegal conduct' so that [the farmer] could 'conform his conduct to the requirements of the law.' '' (internal citations omitted)).

While the MBTA does contemplate the issuance of permits authorizing the taking of wildlife, it requires such permits to be issued by ''regulation.'' *See* 16 U.S.C. 703(a) (''Unless and except as permitted *by regulations* made as hereinafter provided . . ..'' (emphasis added)). No regulations have been issued to create a permit scheme to authorize incidental take, so most potential violators have no formal mechanism to ensure that their actions comply with the law. There are voluntary Service guidelines issued for different industries that recommend best practices to avoid incidental take of protected birds; however, these guidelines provide only limited protection to potential violators. Moreover, most of the Service's MBTA guidelines have not gone through the formal Administrative Procedure Act processes to be considered ''regulations'' and thus are not issued under the permitting authority of section 3 of the MBTA.

In the absence of a permit issued pursuant to Departmental regulation, it is not clear that the Service has any authority under the MBTA to require minimizing or mitigating actions that balance the environmental harm from the taking of migratory birds with other societal goals, such as the production of wind or solar energy. Accordingly, the guidelines do not provide enforceable legal protections for people and businesses who abide by their terms. To wit, the guidelines themselves state that ''it is not possible to absolve individuals or companies'' from liability under the MBTA. Rather, the guidelines are explicit that the Service may only take full compliance into consideration in exercising its discretion whether or not to refer an individual or company to the Department of Justice for prosecution. *See, e.g.,* U.S. Fish and Wildlife Service, Land-Based Wind Energy Guidelines 6 (Mar. 23, 2012).

Under this approach, it is literally impossible for individuals and companies to know exactly what is required of them under the law when otherwise lawful activities necessarily result in accidental bird deaths. Even if they comply with everything requested of them by the Service, they may still be prosecuted, and still found guilty of criminal conduct. *See generally United States* v. *FMC Corp.,* 572 F.2d 902, 904 (2d Cir. 1978) (the court instructed the jury not to consider the company's remediation efforts as a defense: ''Therefore, under the law, good will and good intention and measures taken to prevent the killing of the birds are not a defense.''). In sum, due process ''requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' '' *Smith* v. *Goguen,* 415 U.S. 566, 572–73 (1974).

Reading the MBTA to capture incidental takings could potentially transform average Americans into criminals. The text, history, and purpose of the MBTA demonstrate instead that it is a law limited in relevant part to actions, such as hunting and poaching, that reduce migratory birds and their nests and eggs to human control by killing or capturing. Even assuming that the text could be subject to multiple interpretations, courts and agencies are to avoid interpreting ambiguous laws in ways that raise constitutional doubts if alternative interpretations are available. Thus, interpreting the MBTA to criminalize incidental takings raises potential due process concerns. Based upon the text, history, and purpose of the MBTA, and consistent with decisions in the Courts of Appeals for the Fifth, Eighth, and Ninth circuits, there is an alternative interpretation that avoids these concerns. Therefore, as a matter of law, the scope of the MBTA does not include incidental take.

Policy Analysis of Incidental Take Under the MBTA

As detailed above, the Service agrees that the conclusion in Opinion M–37050 that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to actions directed at migratory birds, their nests, or their eggs is compelled as a matter of law. In addition, even if such a conclusion is not legally compelled, the Service proposes to adopt it as a matter of policy.

The Service's prior approach to incidental take was enacted without public input, and has resulted in regulatory uncertainty and inconsistency. Prosecutions for incidental take occurred in the 1970s without any accompanying change in either the underlying statute or Service regulations. Accordingly, an interpretation with implications for large portions of the American economy was implicitly adopted without public debate. Subsequently, the Service has sought to limit the potential reach of MBTA liability by pursuing enforcement proceedings only against persons who fail to take what the Service considers ''reasonable'' precautions against foreseeable risks.

Based upon the Service's analysis of manmade threats to migratory birds and the Service's own enforcement history, common activities such as owning and operating a power line, wind farm, or drilling operation pose an inherent risk of incidental take. An expansive reading of the MBTA that includes an incidental take prohibition would subject those who engage in these common, and necessary, activities to criminal liability.

As described in M–37050, this approach effectively leaves otherwise lawful, productive, and often necessary businesses to take their chances and hope they avoid prosecution, not because their conduct is or even can be in strict compliance with the law, but because the government has chosen to forgo prosecution. Productive and otherwise lawful economic activity should not be functionally dependent upon the ad hoc exercise of enforcement discretion.

Further, as a practical matter, inconsistency and uncertainty are built into the MBTA enforcement regime by virtue of a split between Federal Courts of Appeals. Courts have adopted different views on whether section 2 of the MBTA prohibits incidental take, and, if so, to what extent. Courts of Appeals in the Second and Tenth Circuits, as well as district courts in at least the Ninth and District of Columbia Circuits, have held that the MBTA criminalizes some instances of incidental take, generally with some form of limiting construction. *See United States* v. *FMC Corporation,* 572 F.2d 902 (2d Cir. 1978); *United States* v. *Apollo Energies, Inc.,* 611 F.3d 679 (10th Cir. 2010); *United States* v. *Corbin Farm Serv.,* 444 F. Supp. 510 (E.D. Cal. 1978); *Ctr. for Biological Diversity* v. *Pirie,* 191 F. Supp. 2d 161 (D.D.C. 2002), *vacated on other grounds sub nom. Ctr.*

for Biological Diversity v. *England,* 2003 App. LEXIS 1110 (D.C. Cir. 2003).

By contrast, Courts of Appeals in the Fifth, Eighth, and Ninth Circuits, as well as district courts in the Third and Seventh Circuits, have indicated that it does not.[1] *See United States* v. *CITGO Petroleum Corp.,* 801 F.3d 477 (5th Cir. 2015); *Newton County Wildlife Ass'n* v. *U.S. Forest Serv.,* 113 F.3d 110 (8th Cir. 1997); *Seattle Audubon Soc'y* v. *Evans,* 952 F.2d 297 (9th Cir. 1991); *Mahler* v. *U.S. Forest Serv.,* 927 F. Supp. 1559 (S.D. Ind. 1996); *Curry* v. *U.S. Forest Serv.,* 988 F. Supp. 541, 549 (W.D. Pa. 1997).

As a result of these cases, the Federal Government is clearly prohibited from enforcing an incidental take prohibition in the Fifth Circuit. In the Eighth Circuit, the Federal Government has previously sought to distinguish court of appeals rulings limiting the scope of the MBTA to the habitat-destruction context. *See generally Apollo Energies,* 611 F.3d at 686 (distinguishing the Eighth Circuit decision in *Newton County* on the grounds that it involved logging that modified a bird's habitat in some way). However, that argument was rejected by a subsequent district court. *See United States* v. *Brigham Oil & Gas, L.P.,* 840 F. Supp. 2d 1202 (D.N.D. 2012). Likewise, the Federal Government has sought to distinguish holdings in the habitat-destruction context in the Ninth Circuit. *See United States* v. *Moon Lake Electrical Ass'n,* 45 F. Supp. 2d 1070, 1075–76 (D. Colo. 1999) (suggesting that the Ninth Circuit's ruling in *Seattle Audubon* may be limited to habitat modification or destruction). In the Second and Tenth Circuits, the Federal Government can apply the MBTA to incidental take, albeit with differing judicial limitations.

These cases demonstrate the potential for a convoluted patchwork of legal standards, all purporting to apply the same underlying law. The MBTA is a national law. Many of the companies and projects that face potential liability under the MBTA operate across boundary lines for judicial circuits. Yet what is legal in the Fifth and Eighth Circuits may become illegal as soon as an operator crosses State lines into the bordering Tenth Circuit, or become a matter of uncertainty in the Ninth Circuit. The Service concludes that it is in its own interest, as well as that of the public, to have and apply a national standard that sets a clear, articulable rule for when an operator crosses the line into criminality. The most effective way to reduce uncertainty and have a truly national standard is for the Service to codify and apply a uniform interpretation of the MBTA that its prohibitions do not apply to incidental take, based upon the Fifth Circuit's ruling in *CITGO Petroleum Corporation.*

Therefore, as a matter of both law and policy, the Service proposes to adopt a regulation limiting the scope of the MBTA to actions that are directed at migratory birds, their nests, or their eggs, and to clarify that injury to or mortality of migratory birds that results from, but is not the purpose of, an action (*i.e.,* incidental taking or killing) is not prohibited by the Migratory Bird Treaty Act.

[1] The Court of Appeals for the Ninth Circuit distinguished, without explicitly overturning, an earlier district-court decision concerning incidental take.

Public Comments

You may submit your comments and supporting materials by one of the methods listed in **ADDRESSES**. We will not consider comments sent by email or fax, or written comments sent to an address other than the one listed in **ADDRESSES**.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, are available for public inspection at *http://www.regulations.gov.* We will post your entire comment—including your personal identifying information—on *http://www.regulations.gov.* You may request at the top of your document that we withhold personal information such as your street address, phone number, or email address from public review; however, we cannot guarantee that we will be able to do so.

We invite the public to provide information on the following topics: (1) The avoidance, minimization, and mitigation measures entities employed to address incidental take of migratory birds, and the degree to which these measures reduce bird mortality; (2) the extent that avoidance, minimization, and mitigation measures continue to be used, and will continue to be used if this proposed rule is finalized; (3) the direct costs associated with implementing these measures; (4) indirect costs entities have incurred related to the legal risk of prosecution for incidental take of migratory birds (*e.g.,* legal fees, increased interest rates on financing, insurance, opportunity costs); (5) the sources and scale of incidental bird mortality; and (6) any quantitative information regarding ecosystem services provided by migratory birds. This information will be used to better inform the cost and benefit analysis of this rulemaking.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

Codifying the Solicitor's Opinion, M–37050, into Federal regulations would provide the public, businesses, government agencies, and other entities legal clarity and certainty regarding what is and is not prohibited under the MBTA. It is anticipated that some entities that currently employ mitigation measures to reduce or eliminate incidental migratory bird take would reduce or curtail these activities given the legal certainty provided by this proposed regulation. Others may continue to employ these measures voluntarily for various reasons, including continued compliance with other Federal, State, and local laws and regulations.

The Service does not have information available to quantify these potential cost savings. Given our lack of specific data to estimate the cost savings from reduced implementation of mitigation measures and increased legal certainty, we ask for such data to inform analysis of the proposed rule's potential effects.

Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (Pub. L. 104–121)), whenever an agency is required to publish a notice of

rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small businesses, small organizations, and small government jurisdictions. However, in lieu of an initial or final regulatory flexibility analysis (IRFA or FRFA) the head of an agency may certify on a factual basis that the rule would not have a significant economic impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities. Thus, for an initial/final regulatory flexibility analysis to be required, impacts must exceed a threshold for ''significant impact'' and a threshold for a ''substantial number of small entities.'' *See* 5 U.S.C. 605(b). This analysis first estimates the number of businesses impacted and then estimates the economic impact of the rule.

Table 1 lists the industry sectors likely impacted by the proposed rule. These are the industries that typically incidentally take substantial numbers of birds and that the Service has worked with to reduce those effects. In some cases, these industries have been subject to enforcement actions and prosecutions under the MBTA prior to the issuance of the M-Opinion. The vast majority of entities in these sectors are small entities, based on the U.S. Small Business Administration (SBA) small business size standards.

TABLE 1—DISTRIBUTION OF BUSINESSES WITHIN AFFECTED INDUSTRIES

NAICS industry description	NAICS code	Number of businesses	Small business size standard (employees)	Number of small businesses
Finfish Fishing	114111	1,210	[a] 20	1,185
Crude Petroleum and Natural Gas Extraction	211111	6,878	1,250s	6,868
Drilling Oil and Gas Wells	213111	2,097	1,000s	2,092
Solar Electric Power Generation	221114	153	250s	153
Wind Electric Power Generation	221115	264	250s	263
Electric Bulk Power Transmission	221121	261	500s	214
Electric Power Distribution	221122	7,557	1,000s	7,520
Wireless Telecommunications Carriers (except Satellite)	517312	15,845	1,500s	15,831

Source: U.S. Census Bureau, 2012 County Business Patterns.

[a] **Note:** The Small Business Administration size standard for finfish fishing is $22 million. Neither Economic Census, Agriculture Census, or NMFS collect business data by revenue size for the finfish industry. Therefore, we employ other data to approximate the number of small businesses. Source: U.S. Census Bureau, 2017 Economic Annual Survey.

Since the Service does not have a permitting system authorizing incidental take of migratory birds, the Service does not have specific information regarding how many businesses in each sector implement measures to reduce incidental take of birds. Not all businesses in each sector incidentally take birds. In addition, a variety of factors would influence whether, under the previous interpretation of the MBTA, businesses would implement such measures. It is also unknown how many businesses continued or reduced practices to reduce the take of birds since publication of the Solicitor's M-Opinion.

This proposed rule is deregulatory in nature and is thus likely to have a positive economic impact on all regulated entities, and many of these entities likely qualify as small businesses under the Small Business Administration's threshold standards (see Table 1). By codifying the M-Opinion, this proposal would remove legal uncertainty for any individual, government entity, or business entity that undertakes any activity that may kill or take migratory birds incidental to otherwise lawful activity. Such small entities would benefit from this proposed rule because it would remove uncertainty about the potential impacts of proposed projects. Therefore, these entities will have better information for planning projects and achieving goals.

However, the economic impact of the proposed rule on small entities is likely not significant. The costs of actions businesses typically implement to reduce effects on birds are small compared to the economic output of business, including small businesses, in these sectors. In addition, many businesses will continue to take actions to reduce effects on birds because these actions are best management practices for their industry or are required by other Federal or State regulations, there is a public desire to continue them, or the businesses simply desire to reduce their effects on migratory birds. Table 2 summarizes likely economic effects of the proposed rule on the business sectors identified in Table 1.

TABLE 2—SUMMARY OF ECONOMIC EFFECTS ON SMALL BUSINESSES

NAICS industry description	NAICS code	Bird mitigation measures with no action	Economic effects on small businesses	Rationale
Finfish Fishing	11411	Changes in design of longline fishing hooks, change in offal management practices, and flagging/streamers on fishing lines.	Likely minimal effects.	Longline fishing is regulated by the National Marine Fisheries Service under the Magnuson-Stevens Fishery Conservation and Management Act and other laws and regulations that limit bi-catch; thus, continuation of these mitigation measures is likely.

TABLE 2—SUMMARY OF ECONOMIC EFFECTS ON SMALL BUSINESSES—Continued

NAICS industry description	NAICS code	Bird mitigation measures with no action	Economic effects on small businesses	Rationale
Crude Petroleum and Natural Gas Extraction.	211111	Using closed waste water systems or netting of oil pits and ponds.	Likely minimal effects.	Several States have regulations governing the treatment of oil pits, including measures beneficial to birds. In addition, much of the industry is increasingly using closed systems, which do not pose a risk to birds. For these reasons, the proposed rule is unlikely to affect a significant number of small entities.
Drilling Oil and Gas Wells	213111	Using closed waste water systems or netting of oil pits and ponds.	Likely minimal effects.	Several States have regulations governing the treatment of oil pits, including measures beneficial to birds. In addition, much of the industry is increasingly using closed systems, which do not pose a risk to birds. For these reasons, the proposed rule is unlikely to affect a significant number of small entities.
Solar Electric Power Generation.	221114	Monitoring bird use and mortality at facilities, limited use of deterrent systems such as streamers and reflectors.	Likely minimal effects.	Bird monitoring in some States would continue to be required under State policies. Where not required, monitoring costs are likely not significant compared to overall project costs.
Wind Electric Power Generation.	221115	Following Wind Energy Guidelines, which involve conducting risk assessments for siting facilities.	Likely minimal effects.	Following the Wind Energy Guidelines has become industry best practice and would likely continue. In addition, the industry uses these guidelines to aid in reducing effects on other regulated species like eagles and threatened and endangered bats.
Electric Bulk Power Transmission.	221121	Following Avian Power Line Interaction Committee (APLIC) guidelines.	Likely minimal effects.	Industry would likely continue to use APLIC guidelines to reduce outages caused by birds and to reduce the take of eagles, regulated under the Bald and Golden Eagle Protection Act.
Electric Power Distribution.	221122	Following Avian Power Line Interaction Committee (APLIC) guidelines.	Likely minimal effects.	Industry would likely continue to use APLIC guidelines to reduce outages caused by birds and to reduce the take of eagles, regulated under the Bald and Golden Eagle Protection Act.
Wireless Telecommunications Carriers (except Satellite).	517312	Installation of flashing obstruction lighting.	Likely minimal effects.	Industry will likely continue to install flashing obstruction lighting to save energy costs and to comply with recent Federal Aviation Administration Lighting Circular and Federal Communication Commission regulations.

To improve our analysis of this proposed rule's effects on small entities, we encourage the submission of relevant information during the public comment period as described above under *Regulatory Planning and Review,* such as additional industry sectors affected, the number of small entities affected, and the scale and nature of economic effects.

As explained above and in the rationale set forth in *Regulatory Planning and Review,* the economic effects on all regulated entities will be positive and that this proposed rule is not a major rule under SBREFA (5 U.S.C. 804(2)). Moreover, we certify that the proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities.

Executive Order 13771—Reducing Regulation and Controlling Regulatory Costs

We expect that this proposed rule will be an Executive Order (E.O.) 13771 (82 FR 9339, February 3, 2017) deregulatory action.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we have determined the following:

a. This proposed rule would not ''significantly or uniquely'' affect small government activities. A small government agency plan is not required.

b. This proposed rule would not produce a Federal mandate on local or State government or private entities. Therefore, this action is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

Takings

In accordance with E.O. 12630, this proposed rule does not contain a provision for taking of private property, and would not have significant takings implications. A takings implication assessment is not required.

Federalism

This proposed rule would not interfere with the States' abilities to manage themselves or their funds. This rule would not have sufficient federalism effects to warrant preparation of a federalism summary impact statement under E.O. 13132.

Civil Justice Reform

In accordance with E.O. 12988, we have reviewed this proposed rule and determined that it will not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We are evaluating this proposed regulation in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10 through 46.450), and the Department of the Interior Manual (516 DM 8). We will complete our analysis, in compliance with NEPA, before finalizing this regulation.

Compliance with Endangered Species Act Requirements

Section 7 of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531–44), requires that ''The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act.'' 16 U.S.C. 1536(a)(1)It further states that ''[e]ach 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 . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.'' 16 U.S.C. 1536(a)(2) Before the Service issues a final rule regarding take of migratory birds, we will comply with provisions of the ESA as necessary to ensure that the proposed amendments are not likely to jeopardize the continued existence of any species designated as endangered or threatened or destroy or adversely modify its critical habitat.

Government-to-Government Relationship with Tribes

In accordance with Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments,'' and the Department of the Interior's manual at 512 DM 2, we are considering the possible effects of this proposed rule on federally recognized Indian Tribes. The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this proposed rule under the criteria in Executive Order 13175 and under the Department's tribal consultation policy and have determined that this rule may have a substantial direct effect on federally recognized Indian tribes. Accordingly, we will initiate government-to-government consultation with federally recognized Indian tribes.

Clarity of this Proposed Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Energy Supply, Distribution, or Use (E.O. 13211)

E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule is not a significant regulatory action under E.O. 13211 and would not significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action. No Statement of Energy Effects is required.

List of Subjects in 50 CFR Part 10

Exports, Fish, Imports, Law enforcement, Plants, Transportation, Wildlife.

Proposed Regulation Promulgation

For the reasons described in the preamble, we propose to amend subchapter B of chapter 1, title 50 of the Code of Federal Regulations, as set forth below:

PART 10—GENERAL PROVISIONS

■ 1. The authority citation for part 10 continues to read as follows:

Authority: 16 U.S.C. 668a–d, 703–712, 742a–j–l, 1361–1384, 1401–1407, 1531–1543, 3371–3378; 18 U.S.C. 42; 19 U.S.C. 1202.

■ 2. Add § 10.14 to subpart B to read as follows:

§ 10.14 Scope of the Migratory Bird Treaty Act.

The prohibitions of the Migratory Bird Treaty Act (16 U.S.C. 703) that make it unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, or kill migratory birds, or attempt to engage in any of those actions, apply only to actions directed at migratory birds, their nests, or their eggs. Injury to or mortality of migratory birds that results from, but is not the purpose of, an action (*i.e.,* incidental taking or killing) is not prohibited by the Migratory Bird Treaty Act.

Dated: January 22, 2020.

Rob Wallace,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2020–01771 Filed 1–31–20; 8:45 am]

BILLING CODE 4333–15–P

515 U.S. 687 (1995)

BABBITT, SECRETARY OF INTERIOR, et al.
v.
SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON et al.

No. 94-859.

United States Supreme Court.

Argued April 17, 1995.
Decided June 29, 1995.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

689 *689 Stevens, J., delivered the opinion of the Court, in which O'Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. O'Connor, J., filed a concurring opinion, *post,* p. 708. Scalia, J., filed a dissenting opinion, in which Rehnquist, C. J., and Thomas, J., joined, *post,* p. 714.

Deputy Solicitor General Kneedler argued the cause for petitioners. With him on the briefs were *Solicitor General Days, Assistant Attorney General Schiffer, Beth S. Brinkmann, Martin W. Matzen, Ellen J. Durkee,* and *Jean E. Williams.*

689 *689 *John A. Macleod* argued the cause for respondents. With him on the brief were *Steven P. Quarles, Clifton S. Elgarten, Thomas R. Lundquist,* and *William R. Murray.*[*]

690 *690 Justice Stevens delivered the opinion of the Court.

The Endangered Species Act of 1973 (ESA or Act), 87 Stat. 884, 16 U. S. C. § 1531 (1988 ed. and Supp. V), contains a variety of protections designed to save from extinction species that the Secretary of the Interior designates as endangered or threatened. Section 9of the Act makes it unlawful for any person to "take" any endangered or threatened species. The Secretary has promulgated a regulation that defines the statute's prohibition on takings to include "significant habitat modification or degradation where it actually kills or injures wildlife." This case presents the question whether the Secretary exceeded his authority under the Act by promulgating that regulation.

I

Section 9(a)(1) of the Act provides the following protection for endangered species:[1]

"Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—. . . . .

691 *691 "(B) take any such species within the United States or the territorial sea of the United States." 16 U. S. C. § 1538(a)(1).

Section 3(19)of the Act defines the statutory term "take":

"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." 16 U. S. C. § 1532(19).

The Act does not further define the terms it uses to define "take." The Interior Department regulations that implement the statute, however, define the statutory term "harm":

"*Harm* in the definition of `take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 CFR § 17.3 (1994).

This regulation has been in place since 1975.[2]

A limitation on the § 9 "take" prohibition appears in § 10(a)(1)(B) of the Act, which Congress added by amendment in 1982. That section authorizes the Secretary to grant a permit for any taking otherwise prohibited by § 9(a)(1)(B) "if such taking is incidental to, and not the purpose of,the carrying out of an otherwise lawful activity." 16 U. S. C. § 1539(a)(1)(B).

In addition to the prohibition on takings, the Act provides several other protections for endangered species. Section 4, 16 U. S. C. § 1533, commands the Secretary to identify species of fish or wildlife that are in
692 danger of extinction and to publish from time to time lists of all species he determines to *692 be endangered or threatened. Section 5, 16 U. S. C. § 1534, authorizes the Secretary, in cooperation with the States, see § 1535, to acquire land to aid in preserving such species. Section 7 requires federal agencies to ensure that none of their activities,including the granting of licenses and permits, will jeopardize the continued existence of endangered species "or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical."16 U. S. C. § 1536(a)(2).

Respondents in this action are small landowners, logging companies, and families dependent on the forest products industries in the Pacific Northwest and in the Southeast, and organizations that represent their interests. They brought this declaratory judgment action against petitioners, the Secretary of the Interior and the Director of the Fish and Wildlife Service, in the United States District Court for the District of Columbia to challenge the statutory validity of the Secretary's regulation defining "harm," particularly the inclusion of habitat modification and degradation in the definition.[3] Respondents challenged the regulation on its face. Their complaint alleged that application of the "harm" regulation to the red-cockaded woodpecker, an endangered species,[4] and the northern spotted owl, a threatened species,[5] had injured them economically. App. 17-23.

693 *693 Respondents advanced three arguments to support their submission that Congress did not intend the word "take" in § 9 to include habitat modification, as the Secretary's "harm" regulation provides. First, they correctly noted that language in the Senate's original version of the ESA would have defined "take" to include "destruction, modification, or curtailment of [the] habitat or range" of fish or wildlife,[6] but the Senate deleted that language from the bill before enacting it. Second, respondents argued that Congress intended the Act's express authorization for the Federal Government to buy private land in order to prevent habitat degradation in § 5 to be the exclusive check against habitat modification on private property. Third, because the Senate added the term "harm" to the definition of "take" in a floor amendment without debate, respondents argued that the court should not interpret the term so expansively as to include habitat modification.

The District Court considered and rejected each of respondents' arguments, finding "that Congress intended an expansive interpretation of the word `take,' an interpretation that encompasses habitat modification." 806 F. Supp. 279, 285 (1992). The court noted that in 1982, when Congress was aware of a judicial decision that had applied the Secretary's regulation, see *Palila* v. *Hawaii Dept. of Land and Natural Resources,* 639 F. 2d 495 (CA9 1981) *(Palila I),* it amended the Act without using the opportunity to change the definition of "take." 806 F. Supp., at 284. The court stated that, even had it found the ESA "`silent or ambiguous' " as to the authority for the Secretary's definition of "harm," it would nevertheless have upheld
694 the regulation as a reasonable interpretation of the statute. *Id.,* at 285 (quoting *694 *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 843 (1984)). The District Court therefore entered summary judgment for petitioners and dismissed respondents' complaint.

A divided panel of the Court of Appeals initially affirmed the judgment of the District Court. 1 F. 3d 1 (CADC 1993). After granting a petition for rehearing, however, the panel reversed. 17 F. 3d 1463 (CADC 1994). Although acknowledging that "[t]he potential breadth of the word `harm' is indisputable," *id.,* at 1464, the majority concluded that the immediate statutory context in which "harm" appeared counseled against a broad reading; like the other words in the definition of "take," the word "harm" should be read as applying only to "the perpetrator's direct application of force against the animal taken . . . . The forbidden acts fit, in ordinary language, the basic model `A hit B.' " *Id.,* at 1465. The majority based its reasoning on a canon of statutory construction called *noscitur a sociis,* which holds that a word is known by the company it keeps. See *Neal* v. *Clark,* 95 U. S. 704, 708-709 (1878).

The majority claimed support for its construction from a decision of the Ninth Circuit that narrowly construed the word "harass" in the Marine Mammal Protection Act of 1972, 16 U. S. C. § 1372(a)(2)(A), see *United States* v. *Hayashi,* 5 F. 3d 1278, 1282 (1993); from the legislative history of the ESA;[7] from its view that Congress must not have intended the purportedly broad curtailment of private property rights that the Secretary's interpretation permitted; and from the ESA's land acquisition provision in § 5 and restriction on federal agencies' activities regarding habitat in § 7, both of which the court saw as evidence that Congress
695 had not intended the § 9 "take" prohibition to reach habitat modification. *695 Most prominently, the court performed a lengthy analysis of the 1982 amendment to § 10 that provided for "incidental take permits" and concluded that the amendment did not change the meaning of the term "take" as defined in the 1973 statute.[8]

Chief Judge Mikva, who had announced the panel's original decision, dissented. See 17 F. 3d, at 1473. In his view, a proper application of *Chevron* indicated that the Secretary had reasonably defined "harm," because respondents had failed to show that Congress unambiguously manifested its intent to exclude habitat modification from the ambit of "take." Chief Judge Mikva found the majority's reliance on *noscitur a sociis* inappropriate in light of the statutory language and unnecessary in light of the strong support in the legislative history for the Secretary's interpretation. He did not find the 1982 "incidental take permit" amendment alone sufficient to vindicate the Secretary's definition of "harm," but he believed the amendment provided additional support for that definition because it reflected Congress' view in 1982 that the definition was reasonable.

The Court of Appeals' decision created a square conflict with a 1988 decision of the Ninth Circuit that had upheld the Secretary's definition of "harm." See *Palila* v. *Hawaii Dept. of Land and Natural Resources,* 852 F. 2d 1106 (1988) *(Palila II).* The Court of Appeals neither cited nor distinguished *Palila II,* despite the stark contrast between the Ninth Circuit's holding and its own. We granted certiorari to resolve the conflict. 513

U. S. 1072 (1995). Our consideration of the text and structure of the Act, its legislative history, and the significance of the 1982 amendment persuades us that the Court of Appeals' judgment should be reversed.

696 *696 II

Because this case was decided on motions for summary judgment, we may appropriately make certain factual assumptions in order to frame the legal issue. First, we assume respondents have no desire to harm either the redcockaded woodpecker or the spotted owl; they merely wish to continue logging activities that would be entirely proper if not prohibited by the ESA. On the other hand, we must assume, *arguendo,* that those activities will have the effect, even though unintended, of detrimentally changing the natural habitat of both listed species and that, as a consequence, members of those species will be killed or injured. Under respondents' view of the law, the Secretary's only means of forestalling that grave result—even when the
697 actor knows it is certain to occur[9]—is to use his § 5 authority to purchase *697 the lands on which the survival of the species depends. The Secretary, on the other hand, submits that the § 9 prohibition on takings, which Congress defined to include "harm," places on respondents a duty to avoid harm that habitat alteration will cause the birds unless respondents first obtain a permit pursuant to § 10.

The text of the Act provides three reasons for concluding that the Secretary's interpretation is reasonable. First, an ordinary understanding of the word "harm" supports it. The dictionary definition of the verb form of "harm" is "to cause hurt or damage to: injure." Webster's Third New International Dictionary 1034 (1966). In the context of the ESA, that definition naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species.

Respondents argue that the Secretary should have limited the purview of "harm" to direct applications of force against protected species, but the dictionary definition does not include the word "directly" or suggest in any way that only direct or willful action that leads to injury constitutes "harm."[10] Moreover, unless the
698 statutory term "harm" encompasses *698 indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that § 3 uses to define "take." A reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary's interpretation. See, *e. g., Mackey* v. *Lanier Collection Agency & Service, Inc.,* 486 U. S. 825, 837, and n. 11 (1988).[11]

Second, the broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid. In *TVA* v. *Hill,* 437 U. S. 153 (1978), we described the Act as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Id.,* at 180. Whereas predecessor statutes enacted in 1966 and 1969 had not contained any sweeping prohibition against the taking of endangered species except on federal lands, see *id.,* at 175, the 1973 Act applied to all land in the United States and to the Nation's territorial seas. As stated in § 2 of the Act, among its central purposes is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . ." 16 U. S. C. § 1531(b).

699 *699 In *Hill,* we construed § 7 as precluding the completion of the Tellico Dam because of its predicted impact on the survival of the snail darter. See 437 U. S., at 193. Both our holding and the language in our opinion stressed the importance of the statutory policy. "The plain intent of Congress in enacting this statute," we recognized, "was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Id.,* at 184. Although the § 9 "take" prohibition was not at issue in *Hill,* we took note of that prohibition, placing particular emphasis on the Secretary's inclusion of habitat modification in his definition of "harm."[12] In light

of that provision for habitat protection, we could "not understand how TVA intends to operate Tellico Dam without `harming' the snail darter." *Id.,* at 184, n. 30. Congress' intent to provide comprehensive protection for endangered and threatened species supports the permissibility of the Secretary's "harm" regulation.

Respondents advance strong arguments that activities that cause minimal or unforeseeable harm will not violate the Act as construed in the "harm" regulation. Respondents, however, present a facial challenge to the regulation. Cf. *Anderson* v. *Edwards,* 514 U. S. 143, 155-156, n. 6 (1995); *INS* v. *National Center for Immigrants' Rights, Inc.,* 502 U. S. 183, 188 (1991). Thus, they ask us to invalidate the Secretary's understanding of "harm" in every circumstance, even when an actor knows that an activity, such as draining
700 a *700 pond, would actually result in the extinction of a listed species by destroying its habitat. Given Congress' clear expression of the ESA's broad purpose to protect endangered and threatened wildlife, the Secretary's definition of "harm" is reasonable.[13]

Third, the fact that Congress in 1982 authorized the Secretary to issue permits for takings that § 9(a)(1)(B) would otherwise prohibit, "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity," 16 U. S. C. § 1539(a)(1)(B), strongly suggests that Congress understood § 9(a)(1)(B) to prohibit indirect as well as deliberate takings. Cf. *NLRB* v. *Bell Aerospace Co.,* 416 U. S. 267, 274-275 (1974). The permit process requires the applicant to prepare a "conservation plan" that specifies how he intends to "minimize and mitigate" the "impact" of his activity on endangered and threatened species, 16 U. S. C. § 1539(a)(2)(A), making clear that Congress had in mind foreseeable rather than merely accidental
701 effects on listed species.[14] No one could seriously request an "incidental" take *701 permit to avert § 9 liability for direct, deliberate action against a member of an endangered or threatened species, but respondents would read "harm" so narrowly that the permit procedure would have little more than that absurd purpose. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone* v. *INS,* 514 U. S. 386, 397 (1995). Congress' addition of the § 10 permit provision supports the Secretary's conclusion that activities not intended to harm an endangered species, such as habitat modification, may constitute unlawful takings under the ESA unless the Secretary permits them.

The Court of Appeals made three errors in asserting that "harm" must refer to a direct application of force because the words around it do.[15] First, the court's premise was flawed. Several of the words that accompany "harm" in the § 3 definition of "take," especially "harass," "pursue," "wound," and "kill," refer to actions or effects that do not require direct applications of force. Second, to the extent the court read a requirement of intent or purpose into the words used to define "take," it ignored § 11's express provision
702 that a "knowin[g]" *702 action is enough to violate the Act. Third, the court employed *noscitur a sociis* to give "harm" essentially the same function as other words in the definition, thereby denying it independent meaning. The canon, to the contrary, counsels that a word "gathers meaning from the words around it." *Jarecki* v. *G. D. Searle & Co.,* 367 U. S. 303, 307 (1961). The statutory context of "harm" suggests that Congress meant that term to serve a particular function in the ESA, consistent with, but distinct from, the functions of the other verbs used to define "take." The Secretary's interpretation of "harm" to include indirectly injuring endangered animals through habitat modification permissibly interprets "harm" to have "a character of its own not to be submerged by its association." *Russell Motor Car Co.* v. *United States,* 261 U. S. 514, 519 (1923).[16]

Nor does the Act's inclusion of the § 5 land acquisition authority and the § 7 directive to federal agencies to avoid destruction or adverse modification of critical habitat alter our conclusion. Respondents' argument that the Government lacks any incentive to purchase land under § 5 when it can simply prohibit takings

under § 9 ignores the practical considerations that attend enforcement of the ESA. Purchasing habitat lands may well cost the Government less in many circumstances than pursuing civil or criminal penalties. In addition, the § 5 procedure allows for protection of habitat before the seller's activity has harmed any
703 endangered animal, *703 whereas the Government cannot enforce the § 9 prohibition until an animal has actually been killed or injured. The Secretary may also find the § 5 authority useful for preventing modification of land that is not yet but may in the future become habitat for an endangered or threatened species. The § 7 directive applies only to the Federal Government, whereas the § 9 prohibition applies to "any person." Section 7 imposes a broad, affirmative duty to avoid adverse habitat modifications that § 9 does not replicate, and § 7 does not limit its admonition to habitat modification that "actually kills or injures wildlife." Conversely, § 7 contains limitations that § 9 does not, applying only to actions "likely to jeopardize the continued existence of any endangered species or threatened species," 16 U. S. C. § 1536(a)(2), and to modifications of habitat that has been designated "critical" pursuant to § 4, 16 U. S. C. § 1533(b)(2).[17] Any overlap that § 5 or § 7 may have with § 9 in particular cases is unexceptional, see, *e. g., Russello* v. *United States,* 464 U. S. 16, 24, and n. 2 (1983), and simply reflects the broad purpose of the Act set out in § 2 and acknowledged in *TVA* v. *Hill.*

We need not decide whether the statutory definition of "take" compels the Secretary's interpretation of "harm," because our conclusions that Congress did not unambiguously manifest its intent to adopt respondents' view and that the Secretary's interpretation is reasonable suffice to decide this case. See generally *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837 (1984). The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the
704 Secretary's reasonable interpretation. See *704 Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 373 (1986).[18]

III

Our conclusion that the Secretary's definition of "harm" rests on a permissible construction of the ESA gains further support from the legislative history of the statute. The Committee Reports accompanying the bills that became the ESA do not specifically discuss the meaning of "harm," but they make clear that Congress intended "take" to apply broadly to cover indirect as well as purposeful actions. The Senate Report stressed that "`[t]ake' is defined . . . in the broadest possible manner to include every conceivable way in which a person can `take' or attempt to `take' any fish or wildlife." S. Rep. No. 93-307, p. 7 (1973). The House Report stated that "the broadest possible terms" were used to define restrictions on takings. H.
705 R. Rep. No. 93-412, p. 15 (1973). The House Report underscored the breadth of the *705 "take" definition by noting that it included "harassment, *whether intentional or not.* " *Id.,* at 11 (emphasis added). The Report explained that the definition "would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young." *Ibid.* These comments, ignored in the dissent's welcome but selective foray into legislative history, see *post,* at 726-729, support the Secretary's interpretation that the term "take" in § 9 reached far more than the deliberate actions of hunters and trappers.

Two endangered species bills, S. 1592 and S. 1983, were introduced in the Senate and referred to the Commerce Committee. Neither bill included the word "harm" in its definition of "take," although the definitions otherwise closely resembled the one that appeared in the bill as ultimately enacted. See Hearings on S. 1592 and S. 1983 before the Subcommittee on Environment of the Senate Committee on Commerce, 93d Cong., 1st Sess., pp. 7, 27 (1973) (hereinafter Hearings). Senator Tunney, the floor

manager of the bill in the Senate, subsequently introduced a floor amendment that added "harm" to the definition, noting that this and accompanying amendments would "help to achieve the purposes of the bill." 119 Cong. Rec. 25683 (1973). Respondents argue that the lack of debate about the amendment that added "harm" counsels in favor of a narrow interpretation. We disagree. An obviously broad word that the Senate went out of its way to add to an important statutory definition is precisely the sort of provision that deserves a respectful reading.

The definition of "take" that originally appeared in S. 1983 differed from the definition as ultimately enacted in one other significant respect: It included "the destruction, modification, or curtailment of [the] habitat or range" of fish and wildlife. Hearings, at 27. Respondents make much of the fact that the Commerce
706 Committee removed this phrase *706 from the "take" definition before S. 1983 went to the floor. See 119 Cong. Rec. 25663 (1973). We do not find that fact especially significant. The legislative materials contain no indication why the habitat protection provision was deleted. That provision differed greatly from the regulation at issue today. Most notably, the habitat protection provision in S. 1983 would have applied far more broadly than the regulation does because it made adverse habitat modification a categorical violation of the "take" prohibition, unbounded by the regulation's limitation to habitat modifications that actually kill or injure wildlife. The S. 1983 language also failed to qualify "modification" with the regulation's limiting adjective "significant." We do not believe the Senate's unelaborated disavowal of the provision in S. 1983 undermines the reasonableness of the more moderate habitat protection in the Secretary's "harm" regulation.[19]

707 *707 The history of the 1982 amendment that gave the Secretary authority to grant permits for "incidental" takings provides further support for his reading of the Act. The House Report expressly states that "[b]y use of the word `incidental' the Committee intends to cover situations in which it is known that a taking will occur if the other activity is engaged in but such taking is incidental to, and not the purpose of, the activity." H. R. Rep. No. 97-567, p. 31 (1982). This reference to the foreseeability of incidental takings undermines respondents' argument that the 1982 amendment covered only accidental killings of endangered and threatened animals that might occur in the course of hunting or trapping other animals. Indeed, Congress had habitat modification directly in mind: Both the Senate Report and the House Conference Report identified as the model for the permit process a cooperative state-federal response to a case in California where a development project threatened incidental harm to a species of endangered butterfly by modification of its habitat. See S. Rep. No. 97-418, p. 10 (1982); H. R. Conf. Rep. No. 97-835, pp. 30-32 (1982). Thus, Congress in 1982 focused squarely on the aspect of the "harm" regulation at issue in this
708 litigation. Congress' implementation of a permit program *708 is consistent with the Secretary's interpretation of the term "harm."

IV

When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary. See 16 U. S. C. §§ 1533, 1540(f). The task of defining and listing endangered and threatened species requires an expertise and attention to detail that exceeds the normal province of Congress. Fashioning appropriate standards for issuing permits under § 10 for takings that would otherwise violate § 9 necessarily requires the exercise of broad discretion. The proper interpretation of a term such as "harm" involves a complex policy choice. When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his. See *Chevron,* 467 U. S., at 865-866. In this case, that reluctance accords with our conclusion, based on the text, structure, and legislative history of

the ESA, that the Secretary reasonably construed the intent of Congress when he defined "harm" to include "significant habitat modification or degradation that actually kills or injures wildlife."

In the elaboration and enforcement of the ESA, the Secretary and all persons who must comply with the law will confront difficult questions of proximity and degree; for, as all recognize, the Act encompasses a vast range of economic and social enterprises and endeavors. These questions must be addressed in the usual course of the law, through case-bycase resolution and adjudication.

The judgment of the Court of Appeals is reversed.

It is so ordered.

Justice O'Connor, concurring.

My agreement with the Court is founded on two understandings. First, the challenged regulation is limited
709 to significant habitat modification that causes actual, as opposed *709 to hypothetical or speculative, death or injury to identifiable protected animals. Second, even setting aside difficult questions of scienter, the regulation's application is limited by ordinary principles of proximate causation, which introduce notions of foreseeability. These limitations, in my view, call into question *Palila* v. *Hawaii Dept. of Land and Natural Resources*, 852 F. 2d 1106 (CA9 1988) *(Palila II),* and with it, many of the applications derided by the dissent. Because there is no need to strike a regulation on a facial challenge out of concern that it is susceptible of erroneous application, however, and because there are many habitat-related circumstances in which the regulation might validly apply, I join the opinion of the Court.

In my view, the regulation is limited by its terms to actions that actually kill or injure individual animals. Justice Scalia disagrees, arguing that the harm regulation "encompasses injury inflicted, not only upon individual animals, but upon populations of the protected species." *Post,* at 716. At one level, I could not reasonably quarrel with this observation; death to an individual animal always reduces the size of the population in which it lives, and in that sense, "injures" that population. But by its insight, the dissent means something else. Building upon the regulation's use of the word "breeding," Justice Scalia suggests that the regulation facially bars significant habitat modification that actually kills or injures *hypothetical* animals (or, perhaps more aptly, causes potential additions to the population not to come into being). Because "[i]mpairment of breeding does not `injure' living creatures," Justice Scalia reasons, the regulation *must* contemplate application to "*a population* of animals which would otherwise have maintained or increased its numbers." *Post,* at 716, 734.

I disagree. As an initial matter, I do not find it as easy as Justice Scalia does to dismiss the notion that significant impairment of breeding injures living creatures. To raze the last remaining ground on which the
710 piping plover currently *710 breeds, thereby making it impossible for any piping plovers to reproduce, would obviously injure the population (causing the species' extinction in a generation). But by completely preventing breeding, it would also injure the individual living bird, in the same way that sterilizing the creature injures the individual living bird. To "injure" is, among other things, "to impair." Webster's Ninth New Collegiate Dictionary 623 (1983). One need not subscribe to theories of "psychic harm," cf. *post,* at 734-735, n. 5, to recognize that to make it impossible for an animal to reproduce is to impair its most essential physical functions and to render that animal, and its genetic material, biologically obsolete. This, in my view, is actual injury.

In any event, even if impairing an animal's ability to breed were not, *in and of itself,* an injury to that animal, interference with breeding can cause an animal to suffer other, perhaps more obvious, kinds of injury. The

regulation has clear application, for example, to significant habitat modification that kills or physically injures animals which, because they are in a vulnerable breeding state, do not or cannot flee or defend themselves, or to environmental pollutants that cause an animal to suffer physical complications during gestation. Breeding, feeding, and sheltering are what animals do. If significant habitat modification, by interfering with these essential behaviors, actually kills or injures an animal protected by the Act, it causes "harm" within the meaning of the regulation. In contrast to Justice Scalia, I do not read the regulation's "breeding" reference to vitiate or somehow to qualify the clear actual death or injury requirement, or to suggest that the regulation contemplates extension to nonexistent animals.

There is no inconsistency, I should add, between this interpretation and the commentary that accompanied the amendment of the regulation to include the actual death or injury requirement. See 46 Fed. Reg. 54748
711 (1981). Quite the contrary. It is true, as Justice Scalia observes, *post,* at 716, *711 that the Fish and Wildlife Service states at one point that "harm" is not limited to "direct physical injury to an individual member of the wildlife species," see 46 Fed. Reg. 54748 (1981). But one could just as easily emphasize the word "direct" in this sentence as the word "individual."[*] Elsewhere in the commentary, the Service makes clear that "section 9's threshold does focus on individual members of a protected species." *Id.,* at 54749. Moreover, the Service says that the regulation has no application to speculative harm, explaining that its insertion of the word "actually" was intended "to bulwark the need for proven injury to a species due to a party's actions." *Ibid.;* see also *ibid.* (approving language that "[h]arm covers actions . . . which actually (as opposed to potentially), cause injury"). That a protected animal could have eaten the leaves of a fallen tree or could, perhaps, have fruitfully multiplied in its branches is not sufficient under the regulation. Instead, as the commentary reflects, the regulation requires demonstrable effect (*i. e.,* actual injury or death) on actual, individual members of the protected species.

By the dissent's reckoning, the regulation at issue here, in conjunction with 16 U. S. C. § 1540(a)(1), imposes liability for any habitat-modifying conduct that ultimately results in the death of a protected animal,
712 "regardless of whether that result is intended or even foreseeable, and no matter how long *712 the chain of causality between modification and injury." *Post,* at 715; see also *post,* at 719. Even if § 1540(a)(1) does create a strict liability regime (a question we need not decide at this juncture), I see no indication that Congress, in enacting that section, intended to dispense with ordinary principles of proximate causation. Strict liability means liability without regard to fault; it does not normally mean liability for every consequence, however remote, of one's conduct. See generally W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 559-560 (5th ed. 1984) (describing "practical necessity for the restriction of liability within some reasonable bounds" in the strict liability context). I would not lightly assume that Congress, in enacting a strict liability statute that is silent on the causation question, has dispensed with this well-entrenched principle. In the absence of congressional abrogation of traditional principles of causation, then, private parties should be held liable under § 1540(a)(1) only if their habitat-modifying actions proximately cause death or injury to protected animals. Cf. *Benefiel* v. *Exxon Corp.,* 959 F. 2d 805, 807-808 (CA9 1992) (in enacting the Trans-Alaska Pipeline Authorization Act, which provides for strict liability for damages that are the result of discharges, Congress did not intend to abrogate common-law principles of proximate cause to reach "remote and derivative" consequences); *New York* v. *Shore Realty Corp.,* 759 F. 2d 1032, 1044, and n. 17 (CA2 1985) (noting that "[t]raditional tort law has often imposed strict liability while recognizing a causation defense," but that, in enacting the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Congress "specifically rejected including a causation requirement"). The regulation, of course, does not contradict the presumption or notion that ordinary principles of causation apply here. Indeed, by use of the word "actually," the regulation clearly rejects speculative or conjectural effects, and thus itself *invokes* principles of proximate causation.

713 *713 Proximate causation is not a concept susceptible of precise definition. See Keeton, *supra,* at 280-281. It is easy enough, of course, to identify the extremes. The farmer whose fertilizer is lifted by a tornado from tilled fields and deposited miles away in a wildlife refuge cannot, by any stretch of the term, be considered the proximate cause of death or injury to protected species occasioned thereby. At the same time, the landowner who drains a pond on his property, killing endangered fish in the process, would likely satisfy any formulation of the principle. We have recently said that proximate causation "normally eliminates the bizarre," *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U. S. 527, 536 (1995), and have noted its "functionally equivalent" alternative characterizations in terms of foreseeability, see *Milwaukee & St. Paul R. Co.* v. *Kellogg,* 94 U. S. 469, 475 (1877) ("natural and probable consequence"), and duty, see *Palsgraf* v. *Long Island R. Co.,* 248 N. Y. 339, 162 N. E. 99 (1928). *Consolidated Rail Corporation* v. *Gottshall,* 512 U. S. 532, 546 (1994). Proximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences. The task of determining whether proximate causation exists in the limitless fact patterns sure to arise is best left to lower courts. But I note, at the least, that proximate cause principles inject a foreseeability element into the statute, and hence, the regulation, that would appear to alleviate some of the problems noted by the dissent. See, *e. g., post,* at 719 (describing "a farmer who tills his field and causes erosion that makes silt run into a nearby river which depletes oxygen and thereby [injures] protected fish").

In my view, then, the "harm" regulation applies where significant habitat modification, by impairing essential behaviors, proximately (foreseeably) causes actual death or injury to identifiable animals that are protected under the Endangered Species Act. Pursuant to my interpretation, *Palila II* —-under which the Court of
714 Appeals held that a state *714 agency committed a "taking" by permitting mouflon sheep to eat mamane-naio seedlings that, when full grown, might have fed and sheltered endangered palila—was wrongly decided according to the regulation's own terms. Destruction of the seedlings did not proximately cause actual death or injury to identifiable birds; it merely prevented the regeneration of forest land not currently sustaining actual birds.

This case, of course, comes to us as a facial challenge. We are charged with deciding whether the regulation on its face exceeds the agency's statutory mandate. I have identified at least one application of the regulation *(Palila II)* that is, in my view, inconsistent with the regulation's *own* limitations. That misapplication does not, however, call into question the validity of the regulation itself. One can doubtless imagine questionable applications of the regulation that test the limits of the agency's authority. However, it seems to me clear that the regulation does not on its terms exceed the agency's mandate, and that the regulation has innumerable valid habitat-related applications. Congress may, of course, see fit to revisit this issue. And nothing the Court says today prevents the agency itself from narrowing the scope of its regulation at a later date.

With this understanding, I join the Court's opinion. Justice Scalia, with whom The Chief Justice and Justice Thomas join, dissenting.

I think it unmistakably clear that the legislation at issue here (1) forbade the hunting and killing of endangered animals, and (2) provided federal lands and federal funds *for the acquisition of private lands,* to preserve the habitat of endangered animals. The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use. I respectfully dissent.

715 *715 I

The Endangered Species Act of 1973 (Act), 16 U. S. C. § 1531 *et seq.* (1988 ed. and Supp. V), provides that "it is unlawful for any person subject to the jurisdiction of the United States to—. . . take any [protected] species within the United States." § 1538(a)(1)(B). The term "take" is defined as "to harass, *harm,* pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." § 1532(19) (emphasis added). The challenged regulation defines "harm" thus:

"*Harm* in the definition of `take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 CFR § 17.3 (1994).

In my view petitioners must lose—the regulation must fall— even under the test of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 843 (1984), so I shall assume that the Court is correct to apply *Chevron.* See *ante,* at 703-704, and n. 18.

The regulation has three features which, for reasons I shall discuss at length below, do not comport with the statute. First, it interprets the statute to prohibit habitat modification that is no more than the cause-in-fact of death or injury to wildlife. *Any* "significant habitat modification" that in fact produces that result by "impairing essential behavioral patterns" is made unlawful, regardless of whether that result is intended or even foreseeable, and no matter how long the chain of causality between modification and injury. See, *e. g., Palila* v. *Hawaii Dept. of Land and Natural Resources,* 852 F. 2d 1106, 1108-1109 (CA9 1988) *(Palila II)* (sheep grazing constituted "taking" of palila birds, since although sheep do not destroy full-grown mamane
716 trees, they do destroy mamane seedlings, which will not grow to *716 full-grown trees, on which the palila feeds and nests). See also Davison, Alteration of Wildlife Habitat as a Prohibited Taking under the Endangered Species Act, 10 J. Land Use & Envtl. L. 155, 190 (1995) (regulation requires only causation-in-fact).

Second, the regulation does not require an "act": The Secretary's officially stated position is that an *omission* will do. The previous version of the regulation made this explicit. See 40 Fed. Reg. 44412, 44416 (1975) ("`Harm' in the definition of `take' in the Act means an act or omission which actually kills or injures wildlife . . ."). When the regulation was modified in 1981 the phrase "or omission" was taken out, but only because (as the final publication of the rule advised) "the [Fish and Wildlife] Service feels that `act' is inclusive of either commissions or omissions which would be prohibited by section [1538(a)(1)(B)]." 46 Fed. Reg. 54748, 54750 (1981). In their brief here petitioners agree that the regulation covers omissions, see Brief for Petitioners 47 (although they argue that "[a]n `omission' constitutes an `act' . . . only if there is a legal duty to act"), *ibid.*

The third and most important unlawful feature of the regulation is that it encompasses injury inflicted, not only upon individual animals, but upon populations of the protected species. "Injury" in the regulation includes "significantly impairing essential behavioral patterns, including *breeding,* " 50 CFR § 17.3 (1994) (emphasis added). Impairment of breeding does not "injure" living creatures; it prevents them from propagating, thus "injuring" *a population* of animals which would otherwise have maintained or increased its numbers. What the face of the regulation shows, the Secretary's official pronouncements confirm. The Final Redefinition of "Harm" accompanying publication of the regulation said that "harm" is not limited to "direct physical injury to an individual member of the wildlife species," 46 Fed. Reg. 54748 (1981), and refers to
717 "injury *to a population,* " *id.,* at 54749 (emphasis added). See also *Palila II, supra,* at 1108; *717 Davison, *supra,* at 190, and n. 177, 195; M. Bean, The Evolution of National Wildlife Law 344 (1983).[1]

None of these three features of the regulation can be found in the statutory provisions supposed to authorize it. The term "harm" in § 1532(19) has no legal force of its own. An indictment or civil complaint that charged the defendant with "harming" an animal protected under the Act would be dismissed as defective, for the only *operative* term in the statute is to "take." If "take" were not elsewhere defined in the Act, none could dispute what it means, for the term is as old as the law itself. To "take," when applied to wild animals, means to reduce those animals, by killing or capturing, to human control. See, *e. g.,* 11 Oxford English Dictionary (1933) ("Take . . . To catch, capture (a wild beast, bird, fish, etc.)"); Webster's New International Dictionary of the English Language (2d ed. 1949) (take defined as "to catch or capture by trapping, snaring, etc., or as prey"); *Geer* v. *Connecticut,* 161 U. S. 519, 523 (1896) ("`[A]ll the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them' ") (quoting the Digest of Justinian); 2 W. Blackstone, Commentaries 411 (1766) ("Every man . . . has an equal right of pursuing and taking to his own use all such creatures as are *ferae naturae* "). This is just the sense in which "take" is used elsewhere in federal legislation and treaty. See, *e. g.,* Migratory Bird Treaty Act, 16 U. S. C. § 703 (1988 ed., Supp. V) (no person may "pursue, hunt, take, capture, kill, [or] attempt to take, capture, or kill" any migratory bird); Agreement on the Conservation of Polar Bears, Nov. 15, 1973, Art. I, 27 U. S. T. 3918, 3921, T. I. A. S. No. 8409 (defining "taking" as "hunting, killing and capturing"). And that meaning fits neatly with the rest of § 1538(a)(1), which makes it unlawful not only to
718 take protected species, but also to import or export them, *718 § 1538(a)(1)(A); to possess, sell, deliver, carry, transport, or ship any taken species, § 1538(a)(1)(D); and to transport, sell, or offer to sell them in interstate or foreign commerce, §§ 1538(a)(1)(E), (F). The taking prohibition, in other words, is only part of the regulatory plan of § 1538(a)(1), which covers all the stages of the process by which protected wildlife is reduced to man's dominion and made the object of profit. It is obvious that "take" in this sense—a term of art deeply embedded in the statutory and common law concerning wildlife—describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals).

The Act's definition of "take" does expand the word slightly (and not unusually), so as to make clear that it includes not just a completed taking, but the process of taking, and all of the acts that are customarily identified with or accompany that process ("to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect"); and so as to include attempts. § 1532(19). The tempting fallacy—which the Court commits with abandon, see *ante,* at 697-698, n. 10—is to assume that *once defined,* "take" loses any significance, and it is only the definition that matters. The Court treats the statute as though Congress had directly enacted the § 1532(19) definition as a self-executing prohibition, and had not enacted § 1538(a)(1)(B) at all. But § 1538(a)(1)(B) *is* there, and if the terms contained in the definitional section are susceptible of two readings, one of which comports with the standard meaning of "take" as used in application to wildlife, and one of which does not, an agency regulation that adopts the latter reading is necessarily unreasonable, for it reads the defined term "take"—the only operative term—out of the statute altogether.[2]

719 *719 That is what has occurred here. The verb "harm" has a *range* of meaning: "to cause injury" at its broadest, "to do hurt or damage" in a narrower and more direct sense. See, *e. g.,* 1 N. Webster, An American Dictionary of the English Language (1828) ("Harm, *v.t.* To hurt; to injure; to damage; *to impair soundness of body, either animal* or vegetable") (emphasis added); American College Dictionary 551 (1970) ("harm . . . *n.* injury; damage; hurt: *to do him bodily harm* "). In fact the more directed sense of "harm" is a somewhat more common and preferred usage; "*harm* has in it a little of the idea of specially focused hurt or injury, as if a personal injury has been anticipated and intended." J. Opdycke, Mark My Words: A Guide to Modern Usage and Expression 330 (1949). See also American Heritage Dictionary 662 (1985) ("*Injure* has the widest range. . . . *Harm* and *hurt* refer principally to what causes physical or mental

distress to living things"). To define "harm" as an act or omission that, however remotely, "actually kills or injures" a population of wildlife through habitat modification is to choose a meaning that makes nonsense of the word that "harm" defines—requiring us to accept that a farmer who tills his field and causes erosion that makes silt run into a nearby river which depletes oxygen and thereby "impairs [the] breeding" of protected fish has "taken" or "attempted to take" the fish. It should take the strongest evidence to make us believe that Congress has defined a term in a manner repugnant to its ordinary and traditional sense.

Here the evidence shows the opposite. "Harm" is merely one of 10 prohibitory words in § 1532(19), and the other 9 fit the ordinary meaning of "take" perfectly. To "harass, pursue, hunt, shoot, wound, kill, trap,
720 capture, or collect" are *720 all affirmative acts (the provision itself describes them as "conduct," see § 1532(19)) which are directed immediately and intentionally against a particular animal—not acts or omissions that indirectly and accidentally cause injury to a population of animals. The Court points out that several of the words ("harass," "pursue," "wound," and "kill") "refer to actions or effects that do not require direct *applications of force.* " *Ante,* at 701 (emphasis added). That is true enough, but force is not the point. Even "taking" activities in the narrowest sense, activities traditionally engaged in by hunters and trappers, do not all consist of direct applications of force; pursuit and harassment are part of the business of "taking" the prey even before it has been touched. What the nine other words in § 1532(19) have in common—and share with the narrower meaning of "harm" described above, but not with the Secretary's ruthless dilation of the word— is the sense of affirmative conduct intentionally directed against a particular animal or animals.

I am not the first to notice this fact, or to draw the conclusion that it compels. In 1981 the Solicitor of the Fish and Wildlife Service delivered a legal opinion on § 1532(19) that is in complete agreement with my reading:

"The Act's definition of `take' contains a list of actions that illustrate the intended scope of the term . . . . With the possible exception of `harm,' these terms all represent forms of conduct that are directed against and likely to injure or kill *individual* wildlife. Under the principle of statutory construction, *ejusdem generis,* . . . the term `harm' should be interpreted to include only those actions that are directed against, and likely to injure or kill, individual wildlife." Memorandum of Apr. 17, reprinted in 46 Fed. Reg. 29490, 29491 (1981) (emphasis in original).

I would call it *noscitur a sociis,* but the principle is much the same: The fact that "several items in a list
721 share an attribute *721 counsels in favor of interpreting the other items as possessing that attribute as well," *Beecham* v. *United States,* 511 U. S. 368, 371 (1994). The Court contends that the canon cannot be applied to deprive a word of all its "independent meaning," *ante,* at 702. That proposition is questionable to begin with, especially as applied to long lawyers' listings such as this. If it were true, we ought to give the word "trap" in the definition its rare meaning of "to clothe" (whence "trappings")—since otherwise it adds nothing to the word "capture." See *Moskal* v. *United States,* 498 U. S. 103, 120 (1990) (Scalia, J., dissenting). In any event, the Court's contention that "harm" in the narrow sense adds nothing to the other words underestimates the ingenuity of our own species in a way that Congress did not. To feed an animal poison, to spray it with mace, to chop down the very tree in which it is nesting, or even to destroy its entire habitat in order to take it (as by draining a pond to get at a turtle), might neither wound nor kill, but would directly and intentionally harm.

The penalty provisions of the Act counsel this interpretation as well. Any person who "knowingly" violates § 1538(a)(1)(B) is subject to criminal penalties under § 1540(b)(1) and civil penalties under § 1540(a)(1); moreover, under the latter section, any person "who otherwise violates" the taking prohibition (*i. e.,* violates it *un* knowingly) may be assessed a civil penalty of $500 for each violation, with the stricture that "[e]ach

such violation shall be a separate offense." This last provision should be clear warning that the regulation is in error, for when combined with the regulation it produces a result that no legislature could reasonably be thought to have intended: A large number of routine private activities—for example, farming, ranching, roadbuilding, construction and logging—are subjected to strict-liability penalties when they fortuitously injure protected wildlife, no matter how remote the chain of causation and no matter how difficult to foresee
722 (or to disprove) the "injury" may be (*e. g.,* *722 an "impairment" of breeding). The Court says that "[the strict-liability provision] is potentially sweeping, but it would be so with or without the Secretary's `harm' regulation." *Ante,* at 696, n. 9. That is not correct. Without the regulation, the routine "habitat modifying" activities that people conduct to make a daily living would not carry exposure to strict penalties; only acts directed at animals, like those described by the other words in § 1532(19), would risk liability.

The Court says that "[to] read a requirement of intent or purpose into the words used to define `take' . . . ignore[s] [§ 1540's] express provision that a `knowin[g]' action is enough to violate the Act." *Ante,* at 701-702. This presumably means that because the reading of § 1532(19) advanced here ascribes an element of purposeful injury to the prohibited acts, it makes superfluous (or inexplicable) the more severe penalties provided for a "knowing" violation. That conclusion does not follow, for it is quite possible to take protected wildlife purposefully without doing so knowingly. A requirement that a violation be "knowing" means that the defendant must "know the facts that make his conduct illegal," *Staples* v. *United States,* 511 U. S. 600, 606 (1994). The hunter who shoots an elk in the mistaken belief that it is a mule deer has not knowingly violated § 1538(a)(1)(B)—not because he does not know that elk are legally protected (that would be knowledge of the law, which is not a requirement, see *ante,* at 696-697, n. 9), but because he does not know what sort of animal he is shooting. The hunter has nonetheless committed a purposeful taking of protected wildlife, and would therefore be subject to the (lower) strict-liability penalties for the violation.

So far I have discussed only the immediate statutory text bearing on the regulation. But the definition of "take" in § 1532(19) applies "[f]or the purposes of this chapter," that is, it governs the meaning of the word *as used everywhere in the Act.* Thus, the Secretary's interpretation of "harm" is wrong if it does not fit with
723 the use of "take" throughout *723 the Act. And it does not. In § 1540(e)(4)(B), for example, Congress provided for the forfeiture of "[a]ll guns, traps, nets, and other equipment . . . used to aid the taking, possessing, selling, [etc.]" of protected animals. This listing plainly relates to "taking" in the ordinary sense. If environmental modification were part (and necessarily a major part) of taking, as the Secretary maintains, one would have expected the list to include "plows, bulldozers, and backhoes." As another example, § 1539(e)(1) exempts "the taking of any endangered species" by Alaskan Indians and Eskimos "if such taking is primarily for subsistence purposes"; and provides that "[n]on-edible byproducts of species taken pursuant to this section may be sold . . . when made into authentic native articles of handicrafts and clothing." Surely these provisions apply to taking only in the ordinary sense, and are meaningless as applied to species injured by environmental modification. The Act is full of like examples. See, *e. g.,* § 1538(a)(1)(D) (prohibiting possession, sale, and transport of "species taken in violation" of the Act). "[I]f the Act is to be interpreted as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout," *Gustafson* v. *Alloyd Co.,* 513 U. S. 561, 569 (1995), the regulation must fall.

The broader structure of the Act confirms the unreasonableness of the regulation. Section 1536 provides:

"Each Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . 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 . . . to be critical." 16 U. S. C. § 1536(a)(2) (emphasis added).

The Act defines "critical habitat" as habitat that is "essential to the conservation of the species," §§ 1532(5)
724 (A)(i), (A)(ii), with "conservation" in turn defined as the use of methods *724 necessary to bring listed species "to the point at which the measures provided pursuant to this chapter are no longer necessary," § 1532(3).

These provisions have a double significance. Even if §§ 1536(a)(2) and 1538(a)(1)(B) were totally independent prohibitions—the former applying only to federal agencies and their licensees, the latter only to private parties—Congress's explicit prohibition of habitat modification in the one section would bar the inference of an implicit prohibition of habitat modification in the other section. "[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp.* v. *United States,* 508 U. S. 200, 208 (1993) (internal quotation marks omitted). And that presumption against implicit prohibition would be even stronger where the one section which uses the language carefully defines and limits its application. That is to say, it would be passing strange for Congress carefully to define "critical habitat" as used in § 1536(a)(2), but leave it to the Secretary to evaluate, willy-nilly, impermissible "habitat modification" (under the guise of "harm") in § 1538(a)(1)(B).

In fact, however, §§ 1536(a)(2) and 1538(a)(1)(B) do *not* operate in separate realms; federal agencies are subject to *both,* because the "person[s]" forbidden to take protected species under § 1538 include agencies and departments of the Federal Government. See § 1532(13). This means that the "harm" regulation also contradicts another principle of interpretation: that statutes should be read so far as possible to give independent effect to all their provisions. See *Ratzlaf* v. *United States,* 510 U. S. 135, 140-141 (1994). By defining "harm" in the definition of "take" in § 1538(a)(1)(B) to include significant habitat modification that injures populations of wildlife, the regulation makes the habitat-modification restriction in § 1536(a)(2)
725 almost wholly superfluous. As "critical habitat" is habitat "essential to the conservation of the *725 species," adverse modification of "critical" habitat by a federal agency would also constitute habitat modification that injures a population of wildlife.

Petitioners try to salvage some independent scope for § 1536(a)(2) by the following contortion: Because the definition of critical habitat includes not only "the specific areas within the geographical area occupied by the species [that are] essential to the conservation of the species," § 1532(5)(A)(i), but also "specific areas outside the geographical area occupied by the species at the time it is listed [as a protected species] . . . [that are] essential to the conservation of the species," § 1532A(5)(ii), there may be some agency modifications of critical habitat which do *not* injure a population of wildlife. See Brief for Petitioners 41, and n. 27. This is dubious to begin with. A principal way to injure wildlife under the Secretary's own regulation is to "significantly impai[r] . . . breeding," 50 CFR § 17.3 (1994). To prevent the natural increase of a species by adverse modification of habitat suitable for expansion assuredly impairs breeding. But even if true, the argument only narrows the scope of the superfluity, leaving as so many wasted words the § 1532(a)(5)(i) definition of critical habitat to include currently *occupied* habitat essential to the species' conservation. If the Secretary's definition of "harm" under § 1538(a)(1)(B) is to be upheld, we must believe that Congress enacted § 1536(a)(2) solely because in its absence federal agencies would be able to modify habitat in currently *unoccupied* areas. It is more rational to believe that the Secretary's expansion of § 1538(a)(1)(B) carves out the heart of one of the central provisions of the Act.

II

The Court makes four other arguments. First, "the broad purpose of the [Act] supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute

726 to avoid." *Ante,* at 698. *726 I thought we had renounced the vice of "simplistically .. . assum[ing] that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States,* 480 U. S. 522, 526 (1987) *(per curiam)* (emphasis in original). Deduction from the "broad purpose" of a statute begs the question if it is used to decide by what *means* (and hence to what *length*) Congress pursued that purpose; to get the right answer to that question there is no substitute for the hard job (or, in this case, the quite simple one) of reading the whole text. "The Act must do everything necessary to achieve its broad purpose" is the slogan of the enthusiast, not the analytical tool of the arbiter.[3]

Second, the Court maintains that the legislative history of the 1973 Act supports the Secretary's definition. See *ante,* at 704-706. Even if legislative history were a legitimate and reliable tool of interpretation (which I shall assume in order to rebut the Court's claim); and even if it could appropriately be resorted to when the enacted text is as clear as this, but see *Chicago* v. *Environmental Defense Fund,* 511 U. S. 328, 337 (1994); here it shows quite the opposite of what the Court says. I shall not pause to discuss the Court's reliance on such statements in the Committee Reports as "`[t]ake' is defined . . . in the broadest possible manner to include every conceivable way in which a person can `take' or attempt to `take' any fish or wildlife.' " S. Rep. No. 93-307, p. 7 (1973) (quoted *ante,* at 704). This sort of empty flourish—to the effect
727 that "this statute means what it means all the way"— *727 counts for little even when enacted into the law itself. See *Reves* v. *Ernst & Young,* 507 U. S. 170, 183-184 (1993).

Much of the Court's discussion of legislative history is devoted to two items: first, the Senate floor manager's introduction of an amendment that added the word "harm" to the definition of "take," with the observation that (along with other amendments) it would "`help to achieve the purposes of the bill' "; second, the relevant Committee's removal from the definition of a provision stating that "take" includes "`the destruction, modification or curtailment of [the] habitat or range' " of fish and wildlife. See *ante,* at 705. The Court inflates the first and belittles the second, even though the second is on its face far more pertinent. But this elaborate inference from various pre-enactment actions and inactions is quite unnecessary, since we have *direct* evidence of what those who brought the legislation to the floor thought it meant—evidence as solid as any ever to be found in legislative history, but which the Court banishes to a footnote. See *ante,* at 706-707, n. 19.

Both the Senate and House floor managers of the bill explained it in terms which leave no doubt that the problem of habitat destruction on private lands was to be solved principally by the land acquisition program of § 1534, while § 1538 solved a different problem altogether—the problem of takings. Senator Tunney stated:

"*Through [the] land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction.*

"Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to *preda- tion by man for commercial, sport, consumption, or other purposes.* The provisions of [the bill] would prohibit the commerce in or the importation, exportation, or taking of endangered species . . . ." 119 Cong. Rec. 25669 (1973) (emphasis added).

728 *728 The House floor manager, Representative Sullivan, put the same thought in this way:

"[T]he principal threat to animals stems from destruction of their habitat. . . .*[The bill] will meet this prob- lem by providing funds for acquisition of critical habitat.* . . . It will also enable the Department of Agriculture to

cooperate with willing landowners who desire to assist in the protection of endangered species, *but who are understandably unwilling to do so at excessive cost to themselves.*

"Another hazard to endangered species arises from those who would *capture or kill them for pleasure or profit.* There is no way that the Congress can make it less pleasurable for a person to take an animal, but we can certainly make it less profitable for them to do so." *Id.,* at 30162 (emphasis added).

Habitat modification and takings, in other words, were viewed as different problems, addressed by different provisions of the Act. The Court really has no explanation for these statements. All it can say is that "[n]either statement even suggested that [the habitat acquisition funding provision in § 1534] would be the Act's exclusive remedy for habitat modification by private landowners or that habitat modification by private landowners stood outside the ambit of [§ 1538]." *Ante,* at 707, n. 19. That is to say, the statements are not as bad as they might have been. Little in life is. They are, however, quite bad enough to destroy the Court's legislative-history case, since they display the clear understanding (1) that habitat modification is separate from "taking," and (2) that habitat destruction on private lands is to be remedied by public acquisition, and *not* by making particular unlucky landowners incur "excessive cost to themselves." The Court points out triumphantly that they do not display the understanding (3) that the land acquisition program is "the [Act's] only response to habitat modification." *729 *Ibid.* Of course not, since that is not so (all *public* lands are subject to habitat-modification restrictions); but (1) and (2) are quite enough to exclude the Court's interpretation. They identify the land acquisition program as the Act's only response to habitat modification *by private landowners,* and thus do not in the least "contradic[t]," *ibid.,* the fact that § 1536 prohibits habitat modification *by federal agencies.*

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Third, the Court seeks support from a provision that was added to the Act in 1982, the year after the Secretary promulgated the current regulation. The provision states:

"[T]he Secretary may permit, under such terms and conditions as he shall prescribe—

. . . . .

"any taking otherwise prohibited by section 1538 (a)(1)(B) . . . if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U. S. C. § 1539(a)(1)(B).

This provision does not, of course, implicate our doctrine that reenactment of a statutory provision ratifies an extant judicial or administrative interpretation, for neither the taking prohibition in § 1538(a)(1)(B) nor the definition in § 1532(19) was reenacted. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.,* 511 U. S. 164, 185 (1994). The Court claims, however, that the provision "strongly suggests that Congress understood [§ 1538(a)(1)(B)] to prohibit indirect as well as deliberate takings." *Ante,* at 700. That would be a valid inference if habitat modification were the only substantial "otherwise lawful activity" that might incidentally and nonpurposefully cause a prohibited "taking." Of course it is not. This provision applies to the many otherwise lawful takings that incidentally take a protected species—as when fishing for unprotected salmon also takes an endangered species of salmon, see *Pacific Northwest Generating Cooperative* v. *Brown,* 38 F. 3d 1058, 1067 (CA9 1994). *730 Congress has referred to such "incidental takings" in other statutes as well—for example, a statute referring to "the incidental taking of . . . seaturtles in the course of . . .harvesting [shrimp]" and to the "rate of incidental taking of sea turtles by United States vessels in the course of such harvesting," 103 Stat. 1038, § 609(b)(2), note following 16 U. S. C. § 1537 (1988 ed., Supp. V); and a statute referring to "the incidental taking of marine mammals in the course of commercial fishing operations," 108 Stat. 546, § 118(a). The Court shows that it misunderstands the question when it says that "[n]o one could seriously request an `incidental' take permit to avert . . . liability

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for direct, deliberate action *against a member of an endangered or threatened species.* " *Ante,* at 700-701 (emphasis added). That is not an *incidental* take at all.[4]

This is enough to show, in my view, that the 1982 permit provision does not support the regulation. I must acknowledge that the Senate Committee Report on this provision, and the House Conference Committee Report, clearly contemplate that it will enable the Secretary to permit environmental modification. See S. Rep. No. 97-418, p. 10 (1982); H. R. Conf. Rep. No. 97-835, pp. 30-32 (1982). But the *text* of the amendment cannot possibly bear that asserted meaning, when placed within the context of an Act that must be interpreted (as we have seen) not to prohibit private environmental modification. The neutral language of the amendment cannot possibly alter that interpretation, nor can its legislative history be summoned forth to contradict, rather than clarify, what is in its totality an unambiguous statutory text. See
731 *Chicago* v. *Environmental Defense Fund,* 511 U. S. 328 (1994). There is little fear, of course, *731 that giving no effect to the relevant portions of the Committee Reports will frustrate the real-life expectations of a majority of the Members of Congress. If they read and relied on such tedious detail on such an obscure point (it was not, after all, presented as a revision of the statute's prohibitory scope, but as a discretionary-waiver provision) the Republic would be in grave peril.

Fourth and lastly, the Court seeks to avoid the evident shortcomings of the regulation on the ground that the respondents are challenging it on its face rather than as applied. See *ante,* at 699; see also *ante,* at 709 (O'Connor, J., concurring). The Court seems to say that *even if* the regulation dispenses with the foreseeability of harm that it acknowledges the statute to require, that does not matter because this is a facial challenge: So long as habitat modification that *would* foreseeably cause harm is prohibited by the statute, the regulation must be sustained. Presumably it would apply the same reasoning to all the other defects of the regulation: The regulation's failure to require injury to particular animals survives the present challenge, because at least *some* environmental modifications kill particular animals. This evisceration of the facial challenge is unprecedented. It is one thing to say that a facial challenge to a regulation that omits statutory element *x* must be rejected if there is any set of facts on which the statute *does not require x.* It is something quite different—and unlike any doctrine of "facial challenge" I have ever encountered—to say that the challenge must be rejected if the regulation could be applied to a state of facts in which element *x happens to be present.* On this analysis, the only regulation susceptible to facial attack is one that *not only* is invalid in all its applications, but also does not sweep up *any* person who *could have been* held liable under a proper application of the statute. That is not the law. Suppose a statute that prohibits "premeditated
732 killing of a human being," and an implementing regulation that prohibits "killing a human *732 being." A facial challenge to the regulation would not be rejected on the ground that, after all, it *could* be applied to a killing that happened to be premeditated. It *could not* be applied to such a killing, because it does not require the factfinder to find premeditation, as the statute requires. In other words, to simplify its task the Court today confuses lawful application of the challenged regulation with lawful application of a *different* regulation, *i. e.,* one requiring the various elements of liability that this regulation omits.

III

In response to the points made in this dissent, the Court's opinion stresses two points, neither of which is supported by the regulation, and so cannot validly be used to uphold it. First, the Court and the concurrence suggest that the regulation should be read to contain a requirement of proximate causation or foreseeability, principally *because the statute does* —and "[n]othing in the regulation purports to weaken those requirements [of the statute]." See *ante,* at 696-697, n. 9; 700, n. 13; see also *ante,* at 711-713 (O'Connor, J., concurring). I quite agree that the statute contains such a limitation, because the verbs of

purpose in § 1538(a)(1)(B) denote action directed at animals. *But the Court has rejected that reading.* The critical premise on which it has upheld the regulation is that, despite the weight of the other words in § 1538(a)(1)(B), "the statutory term `harm' encompasses indirect as well as direct injuries," *ante,* at 697-698. See also *ante,* at 698, n. 11 (describing "the sense of indirect causation that `harm' adds to the statute"); *ante,* at 702 (stating that the Secretary permissibly interprets "`harm' " to include "indirectly injuring endangered animals"). Consequently, unless there is some strange category of causation that is indirect and yet also proximate, the Court has already rejected its own basis for finding a proximate-cause limitation in the regulation. In fact "proximate" causation simply *means* "direct" causation. See, *e. g.,* Black's Law
733 Dictionary 1103 *733 (5th ed. 1979) (defining "[p]roximate" as "Immediate; nearest; *direct* ") (emphasis added); Webster's New International Dictionary 1995 (2d ed. 1949) ("[P]roximate cause. A cause which *directly,* or with no mediate agency, produces an effect") (emphasis added).

The only other reason given for finding a proximate-cause limitation in the regulation is that "by use of the word `actually,' the regulation clearly rejects speculative or conjectural effects, and thus itself *invokes* principles of proximate causation." *Ante,* at 712 (O'Connor, J., concurring); see also *ante,* at 700, n. 13 (majority opinion). *Non sequitur,* of course. That the injury must be "actual" as opposed to "potential" simply says nothing at all about the length or foreseeability of the causal chain between the habitat modification and the "actual" injury. It is thus true and irrelevant that "[t]he Secretary did not need to include `actually' to connote `but for' causation," *ibid.;* "actually" defines the requisite *injury,* not the requisite *causality.*

The regulation says (it is worth repeating) that "harm" means (1) an act that (2) actually kills or injures wildlife. If that does not dispense with a proximate-cause requirement, I do not know what language would. And changing the regulation by judicial invention, even to achieve compliance with the statute, is not permissible. Perhaps the agency itself would prefer to achieve compliance in some other fashion. We defer to reasonable agency interpretations of ambiguous statutes precisely in order that agencies, rather than courts, may exercise policymaking discretion in the interstices of statutes. See *Chevron,* 467 U. S., at 843-845. Just as courts may not exercise an agency's power to adjudicate, and so may not affirm an agency order on discretionary grounds the agency has not advanced, see *SEC* v. *Chenery Corp.,* 318 U. S. 80 (1943), so also this Court may not exercise the Secretary's power to regulate, and so may not uphold a regulation by adding to it even the most reasonable of elements it does not contain.

734 *734 The second point the Court stresses in its response seems to me a belated mending of its holding. It apparently *concedes* that the statute requires injury *to particular animals* rather than merely to populations of animals. See *ante,* at 700, n. 13; *ante,* at 696 (referring to killing or injuring "*members* of [listed] species" (emphasis added)). The Court then rejects my contention that the regulation ignores this requirement, since, it says, "every term in the regulation's definition of `harm' is subservient to the phrase `an act which actually kills or injures wildlife.' " *Ante,* at 700, n. 13. As I have pointed out, see *supra,* at 716-717, this reading is incompatible with the regulation's specification of impairment of "breeding" as one of the *modes* of "kill[ing] or injur[ing] wildlife."[5]

735 *735 But since the Court is reading the regulation and the statute incorrectly in other respects, it may as well introduce this novelty as well—law à la carte. As I understand the regulation that the Court has created and held consistent with the statute that it has also created, habitat modification can constitute a "taking," but only if it results in the killing or harming of *individual animals,* and only if that consequence is the direct result of the modification. This means that the destruction of privately owned habitat that is essential, not for the feeding or nesting, but for the *breeding,* of butterflies, would not violate the Act, since it would not harm or kill any living butterfly. I, too, think it would not violate the Act—not for the utterly unsupported reason that

habitat modifications fall outside the regulation if they happen not to kill or injure a living animal, but for the textual reason that only action directed at living animals constitutes a "take."

* * *

The Endangered Species Act is a carefully considered piece of legislation that forbids all persons to hunt or
736 harm endangered animals, but places upon the public at large, *736 rather than upon fortuitously accountable individual landowners, the cost of preserving the habitat of endangered species. There is neither textual support for, nor even evidence of congressional consideration of, the radically different disposition contained in the regulation that the Court sustains. For these reasons, I respectfully dissent.

[*] Briefs of *amici curiae* urging reversal were filed for the Environmental Law Committee of the Association of the Bar of the City of New York by *Brent L. Brandenburg;* for Friends of Animals, Inc., by *Herman Kaufman;* for the National Wildlife Federation et al. by *Patti A. Goldman* and *Todd D. True;* and for Scientist John Cairns, Jr., et al. by *Wm. Robert Irvin, Timothy Eichenberg,* and *Patrick A. Parenteau.*

Briefs of *amici curiae* urging affirmance were filed for the State of Arizona ex rel. M. J. Hassel, Arizona State Land Commissioner, et al. by *Grant Woods,* Attorney General of Arizona, *Mary Mangotich Grier,* Assistant Attorney General, and *Gale A. Norton,* Attorney General of Colorado; for the State of California et al. by *Daniel Lungren,* Attorney General of California, *Roderick E. Walston,* Chief Assistant Attorney General, *Charles W. Getz IV,* Assistant Attorney General, and *Linus Masouredis,* Deputy Attorney General, and for the Attorneys General for their respective States as follows: *Carla J. Stovall* of Kansas, *Don Stenberg* of Nebraska, and *Jan Graham* of Utah; for the State of Texas by *Dan Morales,* Attorney General, *Jorge Vega,* First Assistant Attorney General, *Javier Aguilar* and *Sam Goodhope,* Special Assistant Attorneys General, and *Paul Terrill* and *Eugene Montes,* Assistant Attorneys General; for the American Farm Bureau Federation et al. by *Timothy S. Bishop, Michael F. Rosenblum, John J. Rademacher, Richard L. Krause, Nancy N. McDonough, Carolyn S. Richardson, Douglas G. Caroom,* and *Sydney W. Falk, Jr.;* for Anderson & Middleton Logging Co., Inc., by *Mark C. Rutzick* and *J. J. Leary, Jr.;* for Cargill, Inc., by *Louis F. Claiborne, Edgar B. Washburn,* and *David Ivester;* for the Chamber of Commerce of the United States of America et al. by *Virginia S. Albrecht, Robin S. Conrad, Ted R. Brown,* and *Ralph W. Holmen;* for the Competitive Enterprise Institute by *Sam Kazman;* for the Davis Mountains Trans-Pecos Heritage Association et al. by *Nancie G. Marzulla;* for the Florida Legal Foundation et al. by *Michael L. Rosen* and *G. Stephen Parker;* for the Institute for Justice by *Richard A. Epstein, William H. Mellor III,* and *Clint Bolick;* for the National Association of Home Builders et al. by *D. Barton Doyle;* for the National Cattlemen's Association et al. by *Roger J. Marzulla, Michael T. Lempres,* and *William G. Myers III;* for the Mountain States Legal Foundation et al. by *William Perry Pendley;* for the Pacific Legal Foundation et al. by *Robin L. Rivett;* for the State Water Contractors et al. by *Gregory K. Wilkinson, Eric L. Garner, Thomas W. Birmingham,* and *Stuart L. Somach;* for the Washington Legal Foundationet al.by *Albert Gidari, Daniel J. Popeo,* and *Paul D. Kamenar;* and for Congressman Bill Baker et al. by *Virginia S. Albrecht.*

Briefs of *amici curiae* were filed for the Nationwide Public Projects Coalition etal.by *Lawrence R. Liebesman, Kenneth S. Kamlet,* and *Duane J. Desiderio;* and for the Navajo Nation et al. by *Scott B. McElroy, Lester K. Taylor, Daniel H. Israel,* and *Stanley Pollack.*

[1] The Act defines the term "endangered species" to mean "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 chapter would present an overwhelming and overriding risk to man." 16 U. S. C. § 1532(6).

[2] The Secretary, through the Director of the Fish and Wildlife Service, originally promulgated the regulation in 1975 and amended it in 1981 to emphasize that actual death or injury of a protected animal is necessary for a violation.See 40 Fed. Reg. 44412, 44416 (1975); 46 Fed. Reg. 54748, 54750 (1981).

[3] Respondents also argued in the District Court that the Secretary's definition of "harm" is unconstitutionally void for vagueness, but they do not press that argument here.

[4] The woodpecker was listed as an endangered species in 1970 pursuant to the statutory predecessor of the ESA.See 50 CFR § 17.11(h) (1994), issued pursuant to the Endangered Species Conservation Act of 1969, 83 Stat. 275.

[5] See 55 Fed. Reg. 26114 (1990). Another regulation promulgated by the Secretary extends to threatened species, defined in the ESA as "any species which is likely to become an endangered species within the foreseeablefuture throughout allor a significant portion of its range," 16 U. S. C. § 1532(20), some but not all of the protections endangered species enjoy. See 50 CFR § 17.31(a) (1994).In the District Court respondents unsuccessfully challenged that regulation's extension of § 9 to threatened species, but they do not press the challenge here.

[6] Senate 1983, reprinted in Hearings on S. 1592 and S. 1983 before the Subcommittee on Environment of the Senate Committee on Commerce, 93d Cong., 1st Sess., 27 (1973).

[7] Judge Sentelle filed a partial concurrence in which he declined to join the portions of the court's opinion that relied on legislative history. See 17 F. 3d 1463, 1472 (CADC 1994).

[8] The 1982 amendment had formed the basis on which the author of the majority's opinion on rehearing originally voted to affirm the judgment of the District Court. Compare 1 F. 3d 1, 11 (CADC 1993) (Williams, J., concurring in part), with 17 F. 3d, at 1467-1472.

[9] As discussed above, the Secretary's definition of "harm" is limited to "act[s] which actually kil[l]or injur[e] wildlife." 50 CFR § 17.3 (1994). In addition, in order to be subject to the Act's criminal penalties or the more severe of its civil penalties, one must "knowingly violat[e]" the Act or its implementing regulations. 16 U. S. C. §§ 1540(a)(1), (b)(1). Congress added "knowingly" in place of "willfully" in 1978 to make "criminal violations of the act a general rather than a specific intent crime." H. R. Conf. Rep. No. 95-1804, p. 26 (1978). The Act does authorize up to a $500 civil fine for "[a]ny person who otherwise violates" the Act or its implementing regulations. 16 U. S. C. § 1540(a)(1). That provision is potentially sweeping, but it would be so with or without the Secretary's "harm" regulation, making it unhelpful in assessing the reasonableness of the regulation. We have imputed scienter requirements to criminal statutes that impose sanctions without expressly requiring scienter, see, *e. g., Staples* v. *United States,* 511 U. S. 600 (1994), but the proper case in which we might consider whether to do so in the § 9 provision for a $500 civil penalty would be a challenge to enforcement of that provision itself, not a challenge to a regulation that merely defines a statutory term. We do not agree with the dissent that the regulation covers results that are not "even foreseeable . . . no matter how long the chain of causality between modification and injury." *Post,* at 715. Respondents have suggested no reason why either the "knowingly violates" or the "otherwise violates" provision of the statute—or the "harm" regulation itself—should not be read to incorporate ordinary requirements of proximate causation and foreseeability. In any event, neither respondents nor their *amici* have suggested that the Secretary employs the "otherwise violates" provision with any frequency.

[10] Respondents and the dissent emphasize what they portray as the "established meaning" of "take" in the sense of a "wildlife take," a meaning respondents argue extends only to "the effort to exercise dominion over some creature, and the concrete effect of *[sic]* that creature." Brief for Respondents 19; see *post,* at 717-718. This limitation ill serves the statutory text, which forbids not taking "some creature" but "tak[ing] any [endangered] *species* "—a formidable task for even the most rapacious feudal lord. More importantly, Congress explicitly defined the operative term "take" in the ESA, no matter how much the dissent wishes otherwise, see *post,* at 717-720, 722-723, thereby obviating the need for us to probe its meaning as we must probe the meaning of the undefined subsidiary term "harm." Finally, Congress' definition of "take" includes several words— most obviously "harass," "pursue," and "wound," in addition to "harm" itself—that fit respondents' and the dissent's definition of "take" no better than does "significant habitat modification or degradation."

[11] In contrast, if the statutory term "harm" encompasses such indirect means of killing and injuring wildlife as habitat modification, the other terms listed in § 3—"harass," "pursue," "hunt," "shoot," "wound," "kill," "trap," "capture," and "collect"—generally retain independent meanings. Most of those terms refer to deliberate actions more frequently than does "harm," and they therefore do not duplicate the sense of indirect causation that "harm" adds to the statute. In addition, most of the other words in the definition describe either actions from which habitat modification does not usually result (*e. g.,* "pursue," "harass") or effects to which activities that modify habitat do not usually lead (*e. g.,* "trap," "collect"). To the extent the Secretary's definition of "harm" may have applications that overlap with other words in the definition, that overlap reflects the broad purpose of the Act. See *infra* this page and 699-700.

[12] We stated: "The Secretary of the Interior has defined the term `harm' to mean `an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; *significant environmental modification or degradation which has such effects is included within the meaning of "harm."*` " *TVA* v. *Hill,* 437 U. S., at 184-185, n. 30 (citations omitted; emphasis in original).

[13] The dissent incorrectly asserts that the Secretary's regulation (1) "dispenses with the foreseeability of harm" and (2) "fail[s] to require injury to particular animals," *post,* at 731. As to the first assertion, the regulation merely implements the statute, and it is therefore subject to the statute's "knowingly violates" language, see 16 U. S. C. §§ 1540(a)(1), (b)(1), and ordinary requirements of proximate causation and foreseeability. See n.9, *supra.* Nothing in the regulation purports to weaken those requirements. To the contrary, the word "actually" in the regulation should be construed to limit the liability about which the dissent appears most concerned, liability under the statute's "otherwise violates" provision. See n. 9, *supra; post,* at 721-722, 732-733. The Secretary did not need to include "actually" to connote "but for" causation, which the other words in the definition obviously require. As to the dissent's second assertion, every term in the regulation's definition of "harm" is subservient to the phrase "an act which actually kills or injures wildlife."

[14] The dissent acknowledges the legislative history's clear indication that the drafters of the 1982 amendment had habitat modification in mind, see *post,* at 730, but argues that the text of the amendment requires a contrary conclusion. This argument overlooks the statute's requirement of a "conservation plan," which must describe an alternative to a known, but undesired, habitat modification.

[15] The dissent makes no effort to defend the Court of Appeals' reading of the statutory definition as requiring a direct application of force. Instead, it tries to impose on § 9 a limitation of liability to "affirmative conduct intentionally directed against a particular animal or animals." *Post,* at 720. Under the dissent's interpretation of the Act, a developer could drain a pond, knowing that the act would extinguish an endangered species of turtles, without even proposing a conservation plan or applying for a permit under § 10(a)(1)(B); unless the developer was motivated by a desire "to get at a turtle," *post,* at 721, no statutory taking could occur. Because such conduct would not constitute a taking at common law, the dissent would shield it from § 9 liability, even though the words "kill" and "harm" in the

statutory definition could apply to such deliberate conduct. We cannot accept that limitation. In any event, our reasons for rejecting the Court of Appeals' interpretation apply as well to the dissent's novel construction.

[16] Respondents' reliance on *United States* v. *Hayashi,* 22 F. 3d 859 (CA9 1993), is also misplaced. *Hayashi* construed the term "harass," part of the definition of "take" in the Marine Mammal Protection Act of 1972, 16 U. S. C. § 1361 *et seq.,* as requiring a "direct intrusion" on wildlife to support a criminal prosecution. 22 F. 3d, at 864. *Hayashi* dealt with a challenge to a single application of a statute whose "take" definition includes neither "harm" nor several of the other words that appear in the ESA definition. Moreover, *Hayashi* was decided by a panel of the Ninth Circuit,the same court that had previously upheld the regulation at issue here in *Palila II,* 852 F. 2d 1106 (1988). Neither the *Hayashi* majority nor the dissent saw any need to distinguish or even to cite *Palila II.*

[17] Congress recognized that §§ 7 and 9 are not coextensive as to federal agencies when, in the wake of our decision in *Hill* in 1978, it added § 7*(o),* 16 U. S. C. § 1536*(o),* to the Act. That section provides that any federal project subject to exemption from § 7, 16 U. S. C. § 1536(h),will also be exempt from § 9.

[18] Respondents also argue that the rule of lenity should foreclose any deference to the Secretary's interpretation of the ESA because the statute includes criminal penalties. The rule of lenity is premised on two ideas: First, "`a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed' "; second, "legislatures and not courts should define criminal activity." *United States* v. *Bass,* 404 U. S. 336, 347-350 (1971) (quoting *McBoyle* v. *United States,* 283 U. S. 25, 27 (1931)). We have applied the rule of lenity in a case raising a narrow question concerning the application of a statute that contains criminal sanctions to a specific factual dispute—whether pistols with short barrels and attachable shoulder stocks are short-barreled rifles —where no regulation was present. See *United States* v. *Thompson/Center Arms Co.,* 504 U. S. 505, 517-518, and n. 9 (1992). We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement. Even if there exist regulations whose interpretations of statutory criminal penalties provide such inadequate notice of potential liability as to offend the rule of lenity, the "harm" regulation, which has existed for two decades and gives a fair warning of its consequences, cannot be one of them.

[19] Respondents place heavy reliance for their argument that Congress intended the § 5 land acquisition provision and not § 9 to be the ESA's remedy for habitat modification on a floor statement by Senator Tunney:

"Many species have been inadvertently exterminated by a negligent destruction of their habitat. Their habitats have been cut in size, polluted, or otherwise altered so that they are unsuitable environments for natural populations of fish and wildlife. Under this bill, we can take steps to make amends for our negligent encroachment. The Secretary would be empowered to use the land acquisition authority granted to him in certain existing legislation to acquire land for the use of the endangered species programs. . . . Through these land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction.

"Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to predation by man for commercial, sport, consumption, or other purposes. The provisions in S. 1983 would prohibit the commerce in or the importation, exportation, or taking of endangered species . . . ." 119 Cong. Rec. 25669 (1973).

Similarly, respondents emphasize a floor statement by Representative Sullivan, the House floor manager for the ESA:

"For the most part, the principal threat to animals stems from destruction of their habitat. . . . H. R. 37will meet this problem by providing funds for acquisition of critical habitat . . . . It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, but who are understandably unwilling to do so at excessive cost to themselves.

"Another hazard to endangered species arises from those who would capture or kill them for pleasure or profit. There is no way that Congress can make it less pleasurable for a person to take an animal, but we can certainly make it less profitable for them to do so." *Id.,* at 30162.

Each of these statements merely explained features of the bills that Congress eventually enacted in § 5 of the ESA and went on to discuss elements enacted in § 9. Neither statement even suggested that § 5 would be the Act's exclusive remedy for habitat modification by private landowners or that habitat modification by private landowners stood outside the ambit of § 9. Respondents' suggestion that these statements identified § 5 as the ESA's only response to habitat modification contradicts their emphasis elsewhere on the habitat protections in § 7. See *supra,* at 702-703.

[*] Justice Scalia suggests that, if the word "direct" merits emphasis in this sentence, then the sentence should be read as an effort to negate principles of proximate causation. See *post,* at 734-735, n. 5. As this case itself demonstrates, however, the word "direct" is susceptible of many meanings. The Court of Appeals, for example, used "direct" to suggest an element of purposefulness. See 17 F. 3d 1463, 1465 (CADC 1994). So, occasionally, does the dissent. See *post,* at 720 (describing "affirmative acts. . . which are *directed* immediately and intentionally against a particular animal") (emphasis added). It is not hard to imagine conduct that, while "indirect" (*i. e.,* nonpurposeful), proximately causes actual death or injury to individual protected animals, cf. *post,* at 732; indeed, principles of proximate cause routinely apply in the negligence and strict liability contexts.

[1] The Court and Justice O'Connor deny that the regulation has the first or the third of these features. I respond to their arguments in Part III, *infra.*

[2] The Court suggests halfheartedly that "take" cannot refer to the taking of particular animals, because § 1538(a)(1)(B) prohibits "tak[ing] any [endangered] *species.* " *Ante,* at 697, n. 10. The suggestion is halfhearted because that reading obviously contradicts the statutory intent. It would mean no violation in the intentional shooting of a single bald eagle—or, for that matter, the intentional shooting of 1,000 bald eagles out of the extant 1,001. The phrasing of § 1538(a)(1)(B), as the Court recognizes elsewhere, see, *e. g., ante,* at 696, is shorthand for "take any [*member of* an endangered] species."

[3] This portion of the Court's opinion, see *ante,* at 699, n. 12, discusses and quotes a footnote in *TVA* v. *Hill,* 437 U. S. 153, 184-185, n. 30 (1978), in which we described the then-current version of the Secretary's regulation, and said that the habitat modification undertaken by the federal agency in the case would have violated the regulation. Even if we had said that the Secretary's regulation was *authorized* by § 1538, that would have been utter dictum, for the only provision at issue was § 1536. See *id.,* at 193. But in fact we simply opined on the effect of the regulation while assuming its validity, just as courts always do with provisions of law whose validity is not at issue.

[4] The statutory requirement of a "conservation plan" is as consistent with this construction as with the Court's. See *ante,* at 700, and n.14. The commercial fisherman who is in danger of incidentally sweeping up protected fish in his nets can quite reasonably be required to "minimize and mitigate" the "impact" of his activity. 16 U. S. C. § 1539(a)(2)(A).

[5] Justice O'Connor supposes that an "impairment of breeding" intrinsically injures an animal because "to make it impossible for an animal to reproduce is to impair its most essential physical functions and to render that animal, and its genetic material, biologically obsolete." *Ante,* at 710 (concurring opinion). This imaginative construction does achieve the result of extending "impairment of breeding" to individual animals; but only at the expense of also expanding "injury" to include elements beyond *physical harm* to individual animals. For surely the only harm to the individual animal from impairment of that "essential function" is not the failure of issue (which harms only the issue), but the *psychic harm* of perceiving that it will leave this world with no issue (assuming, of course, that the animal in question, perhaps an endangered species of slug, is capable of such painful sentiments). If it includes *that* psychic harm, then why not the psychic harm of not being able to frolic about—so that the draining of a pond used for an endangered animal's recreation, but in no way essential to its survival, would be prohibited by the Act? That the concurrence is driven to such a dubious redoubt is an argument for, not against, the proposition that "injury" in the regulation includes injury to populations of animals. Even more so with the concurrence's alternative explanation: that "impairment of breeding" refers to nothing more than concrete injuries inflicted by the habitat modification on the animal who does the breeding, such as "physical complications [suffered] during gestation," *ibid.* Quite obviously, if "impairment of breeding" meant such physical harm to an individual animal, it would not have had to be mentioned.

The concurrence entangles itself in a dilemma while attempting to explain the Secretary's commentary to the harm regulation, which stated that "harm" is not limited to "direct physical injury to an individual member of the wildlife species," 46 Fed. Reg. 54748 (1981). The concurrence denies that this means that the regulation does not require injury to particular animals, because "one could just as easily emphasize the word `direct' in this sentence as the word `individual.' " *Ante,* at 711. One could; but if the concurrence does, it thereby refutes its separate attempt to exclude indirect causation from the regulation's coverage, see *ante,* at 711— 713. The regulation, after emerging from the concurrence's analysis, has acquired *both* a proximate-cause limitation *and* a particular-animals limitation—precisely the one meaning that the Secretary's quoted declaration will not allow, whichever part of it is emphasized.

South Carolina Bar

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The American System of Conservation Funding

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Agenda

- Who pays for conservation?
- Federal excise taxes and distribution to states
- Conservation on private land
- Conservation in South Carolina
- Private land and the Endangered Species Act
- Buy our book!

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Q: Who Manages Wildlife?
A: States!

- State fish and wildlife agencies have a combined budget of $5.63 billion (AFWA, 2017)

Q: Who Funds Wildlife Management?
A: Users Like You!

- Of this $5.63 billion, 58.8 percent ($3.3 billion) comes from hunting and fishing related activities (AFWA, 2017)

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"Hunting and Fishing Related Activities"

(AFWA 2017)

- Hunting and fishing licenses } 35%
- Hunting tags
- **Federal excise taxes** } 24%

Other Sources of Funding

- Other state user fees (e.g. entry fees on state land)
- Federal grants (e.g. ESA Section 6; State Wildlife Grants)
- General funds
- Special cases (e.g. Missouri sales tax, 1/8%)

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The "User Pays" Model of Funding Conservation

- Note: Not the same thing as the North American Model of Wildlife Conservation!
- State fees for the privilege of hunting and fishing

  +
- Federal excise taxes on hunting and fishing equipment

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Federal Aid in Wildlife and Sport Fish Restoration (WSFR)

- Establishment
  - An 11% excise tax on firearms and ammunition was first collected in 1919.
  - In 1937 the Federal Aid in Wildlife Restoration Act (commonly called the Pittman-Robertson Act) redirected this tax into the Wildlife Restoration Trust Fund.
  - In 1950 the Federal Aid in Sport Fish Restoration Act (commonly called the Dingell-Johnson Act) which applied the same model to aquatic species, establishing the Sport Fish Restoration Fund.
- Key Amendments
  - 1970 (Public Law 91-503: Federal Aid in Wildlife Restoration Act Amendments of 1970/ Federal Aid in Fish Restoration Act Amendments of 1970): Established requirements for management plans and added 10% tax on handguns.
  - 1984 Wallop-Breaux amendment to the Dingell-Johnson Act reallocated federal motorboat fuel taxes from the Highway Trust Fund and divided them evenly between the Sport Fish Restoration Fund and a new Boat Safety Fund (since 2005 the two accounts are known simply as the Sport Fish Restoration and Boating Trust Fund). Also imposed new tax on fish finders and electric trolling motors
  - Many other amendments made minor adjustments (expansions) to items taxed.

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Funding: Federal Excise Taxes

Item…	Taxed…	To Support
Firearms	10% (handguns) or 11% (other)	Wildlife restoration
Ammunition	11%	Wildlife restoration
Bows, Quivers, Arrow Tips, etc,	11%	Wildlife restoration
Fishing tackle	10%	Sport Fish Restoration
Electric trolling (outboard) boat motors	3%	Sport Fish Restoration
Motorboat and small engine fuel	Variable	Sport Fish Restoration (appropriation)
Imported yachts and pleasure craft	Variable (1% to 2.7%)	Sport Fish Restoration
Other imported fishing equipment	Variable (3.7% to 9.2%)	Sport Fish Restoration
Other	--	--

Authorized Expenditures of PR/DJ Funds Include:

- Wildlife restoration
- Sport fish restoration
- Hunter education
- Public target ranges
- Public access to land
- Aquatic education
- Wetlands restoration
- Boating safety
- Boating sanitation

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How It Works

- Funds distributed to states and territories annually.
- Each state's funding based on a formula that accounts for land area and # licensed hunters and anglers.
- States must provide a 25% match - $1 for every $3 federal dollars. Matching funds must come from a non-federal source but can be state or private, including in-kind.
- Funds reimburse specific expenses declared to USFWS in advance. States must either maintain a five-year fish and wildlife management plan (revised every three years) OR annually submit planned projects for approval. WSFR funds may only be spent on projects submitted to and approved by USFWS.
- Includes sub-programs. E.g.
  - Multistate Conservation Grant Program - $6 million /year for regional projects
  - National Coastal Wetlands Conservation Grants – Individually selected grants to protect coastal wetlands and associated uplands

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WSFR: Impact

	Wildlife	Sport Fish	Total
2019, South Carolina	$8.941 million	$4.893 million	$13.834 million
2019, United States	$673.586 million	$370.397 million	$1,043.983 million
All-time, South Carolina	$159.375 million	$125.231 million	$284.606 million
All time, United States	$12,204.853 million	$9,757.682 million	$21,962.535 million

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WSFR: Current Events

- Issue: In some states, achieving the 25% matching funds is growing difficult. Hunting and hunting revenue ↓ even as gun and ammunition sales↑.
  - LAW: Modernizing the Pittman-Robertson Fund for Tomorrow's Needs Act.
    - Passed in continuing resolution in December 2019.
    - Adds "the promotion of hunting and recreational shooting" to the purposes of WSFR funds.
  - Proposal: The Target Practice and Marksmanship Training Support Act.
    - Would reduce state match from 25% to 10% for target shooting facilities.
- Issue: Many are concerned that we are investing too little money into non-game species conservation.
  - Proposal: Recovering America's Wildlife Act
    - Would add to WSFR programs ~$1.4 trillion of federal general fund appropriations to be distributed to the states (25% match) for the purpose of conserving nongame species.
    - Would fully fund all State Wildlife Action Plans and provide conservation funding to tribes as well.
    - Changes in the current Congress: Original $1.3 trillion proposal increased to fund tribal programs. Funding no longer comes from oil, gas, and mineral revenues.

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Where Does Conservation Happen in South Carolina?

- South Carolina is ~95% state and private land.
  - Includes state Wildlife Management Areas and Natural Heritage Preserves
  - 92% of SC hunting land is privately owned

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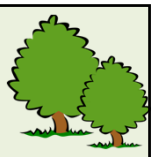
Who Pays for Conservation in South Carolina?



- SC DNR Division of Wildlife and Freshwater Fisheries 2019 budget: $28.416 million
  - General Funds: $3.490 million
  - Federal wildlife funds: $13.834 million
    - **Pittman-Robertson: $8.941 million**
    - **Dingell-Johnson: $4.893 million**
  - State Wildlife Grants: $1.325 million
  - (Balance of ~$10 million paid by hunting and fishing licenses and other sources of revenue)

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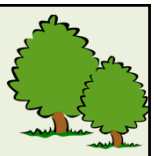
Who Pays for Conservation in South Carolina?



- Federal Farm Bill Programs (FY ‘18)
  - Environmental Quality Incentive Program: $39.595 million
  - Conservation Stewardship Program: $9.458 million
  - Conservation Reserve Program: $3.101 million
  - Agricultural Conservation Easement Program: $2.410 million

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Other Landowner Conservation Resources in South Carolina

- DNR "Wildlife Technical Assistance Providers List"
- Land Trusts (30 total)
- Conservation Districts
- Agricultural Extensions (Clemson University; South Carolina State University)
- National Fish and Wildlife Foundation
- NGOs

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The Endangered Species Act of 1973 and Private Land

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The Endangered Species Act of 1973 and Private Land

- Federal jurisdiction only over species formally listed as "threatened" or "endangered"
- The Endangered Species Act prohibits "take" of listed species
  - Special rules for "threatened" species
- The Endangered Species Act prohibits "destruction or adverse modification" of critical habitat
  - "Federal nexus" required
  - Availability of programmatic Section 7 consultations
- Don't be fooled by popular mythology

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Regulatory Assurances for Landowners

- Section 10: "Exceptions"
  - 10(a)(2) incidental take permits
    - Added to the ESA in 1982 amendments due to work on San Bruno Mountain in California
    - Require an approved habitat conservation plan (HCP)
    - HCPs range from massive multi-year regional HCPs all the way down to "low effect" HCPs for projects with negligible impacts, such as building a single house
    - 1994 "no surprises" policy/rule made HCPs more viable

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Regulatory Assurances for Landowners

- Section 10: "Exceptions"
  - 10(a)(1) enhancement of survival permits
    - Originally for scientific research, captive breeding, etc.
    - Enter the red-cockaded woodpecker…

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Regulatory Assurances for Landowners

- Section 10: "Exceptions"
  - 10(a)(1) enhancement of survival permits
    - DOD, USFWS, EDF, and other developed a specialized HCP in the Sandhills region of NC around Ft. Bragg., designed to encourage private lands around the base to cultivate new woodpecker habitat
    - Concept evolved into "Safe Harbor Agreements," formalized in 1999 rule
    - Companion "Candidate Conservation Agreements with Assurances" apply to not-yet-listed species

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Significance

- Regulatory assurances developed by USFWS and NMFS ("no surprises"; SHAs; CCAAs) are the major innovations in the ESA since the law was last substantially amended in 1988
- Made conservation of T&E species on private land feasible – earlier recovery plans (incl. for RCW) assumed virtually all recovery would be on public lands
- RCW now has 2.5 million acres of private land enrolled in SHAs, population has increased 30% or more since 1993, and the species is on the road to recovery.
- Compare to Northwest Forest Plan (1994) – placed conservation burden on public lands to allow private and state forests to keep logging. Did not save the logging industry; did not satisfy critics; did not arrest the owl's decline

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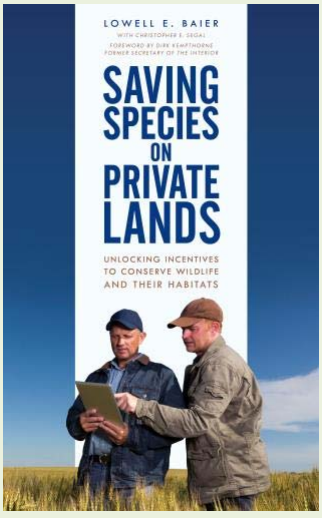
How to Find Landowner Resources? BUY THIS BOOK!!!



Features:

- Introduction to concepts such as conservation planning, enrolling in conservation programs; conservation easements, financial and tax considerations, etc.
- Comprehensive guide to federal conservation programs with examples of typical state, local, and private opportunities.
- Includes a land owners' guide to the Endangered Species Act, explaining when and how regulations apply and how to secure regulatory assurances.
- Online resources and agency contact information throughout text and in appendices.

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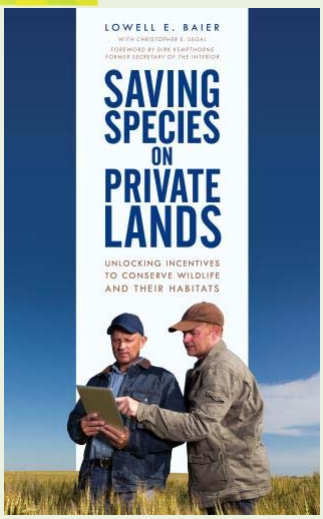
Questions?



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