UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-16326

GRAND CANYON TRUST,

Plaintiff-Appellant,

v.

UNITED STATES BUREAU OF RECLAMATION, ET AL.,

Defendants-Appellees,

and

STATE OF ARIZONA, ET AL.,

Intervenors-Appellees.

On Appeal from the United States District Court for the District of Arizona

Civil Action No. 3:07-CV-8164-PHX-DGC

The Honorable David G. Campbell, District Judge

APPELLANT'S OPENING BRIEF

McCrystie Adams
Earthjustice
1400 Glenarm Place, Suite 300
Denver, CO 80202
Telephone: (303) 623-0466
madams@earthjustice.org

Neil Levine
Grand Canyon Trust
4438 Tennyson St
Denver, CO 80212
Telephone: (303) 455-0604
nlevine@grandcanyontrust.org

October 18, 2011

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Grand Canyon Trust has no parent corporations, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES PRESENTED FOR REVIEW 1

ADDENDUM STATEMENT 2

STATEMENT OF THE CASE 2

I. NATURE OF THE CASE 2

II. LEGAL BACKGROUND 3

A. Endangered Species Act 3

B. National Environmental Policy Act 5

III. STATEMENT OF FACTS 5

A. Glen Canyon Dam 5

B. The Dam's Impacts On The Chub 6

C. Grand Canyon Protection Act, Operating Criteria, And AOPs 8

D. 1994 Biological Opinion On Dam Operations 10

IV. COURSE OF PROCEEDINGS AND DISPOSITION BELOW 13

A. District Court Ruling On AOPs 14

B. District Court Ruling On The 2009 BO 14

C. District Court Ruling On The 2010 ITS 17

SUMMARY OF THE ARGUMENT 19

STANDARD OF REVIEW 20

ARGUMENT 21

I. FWS'S 2009 BIOLOGICAL OPINION IS UNLAWFUL 21

A. Jeopardy: The BO Demonstrates That MLFF Prevents Spawning And Reduces Distribution And Numbers In The Colorado River 23

B. Adverse Modification: The BO Demonstrates MLFF Adversely Modifies Habitat "Features" Essential For The Chub's Colorado River Critical Habitat 25

C. The Status Of The Chub's LCR Population Does Not Support FWS's Changed Conclusions 29

D. FWS's Findings Regarding Predatory Nonnatives Are Unsupported 34

II. RECLAMATION VIOLATED ITS DUTY TO AVOID CAUSING ADVERSE MODIFICATION AND JEOPARDY 37

III. THE ESA CITIZEN SUIT AND APA PROVIDE JURISDICTION TO REVIEW FWS'S RECOVERY GOALS 38

A. ESA Jurisdiction 38

B. Alternatively, APA Jurisdiction Is Present 39

IV. RECLAMATION IS VIOLATING THE ESA'S TAKE PROHIBITION 41

A. Dam Operations Unlawfully "Take" Humpback Chub 41

B. FWS's 2010 ITS Is Unlawful 42

1. FWS's Claim That Take Of Young Chub Cannot Be Quantified Is Unsupported 43

2. FWS's Take Surrogate Is Not Adequately Linked To The Take Of Young Chub 45

3. FWS Arbitrarily Failed To Include "Reasonable And Prudent Measures" In The 2010 ITS 46

V. RECLAMATION'S AOPS MUST COMPLY WITH THE ESA 48

A. AOPs Are Discretionary Decisions That Determine Monthly Volumes Released From The Dam 50

B. AOPs May Affect The Chub And Its Critical Habitat 55

VI. RECLAMATION MUST COMPLY WITH NEPA FOR AOPS 56

A. AOPs Are Final Agency Actions Under The APA 56

B. AOPs Are Major Federal Actions 57

C. AOPs May Significantly Affect Grand Canyon Resources 59

CONCLUSION 60

TABLE OF AUTHORITIES

FEDERAL CASES

Arizona Cattle Growers' Association v. U.S. Fish & Wildlife Service,
273 F.3d 1229 (9th Cir. 2001) 42, 45

Bennett v. Spear,
520 U.S. 154 (1997).....40, 56

Butte Environmental Council v. U.S. Army Corps of Engineers,
620 F.3d 936 (9th Cir. 2010) 22, 27

California v. U.S. Department of Agriculture,
575 F.3d 999 (9th Cir. 2009) 49

Conner v. Burford,
848 F.2d 1441 (9th Cir. 1988) 31

Center for Biological Diversity v. BLM,
422 F. Supp. 2d 1115 (N.D. Cal. 2006).....23

Center for Biological Diversity v. Rumsfeld,
198 F. Supp. 2d 1139 (D. Ariz. 2002) 34

Center for Biological Diversity v. Salazar,
2011 WL 2160254 (D. Ariz. May 28, 2011).....23

Environmental Protection Information Center v. Simpson Timber Co.,
255 F.3d 1073 (9th Cir. 2001) 49

Franklin v. Massachusetts,
505 U.S. 788 (1992).....40

Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service,
378 F.3d 1059 (9th Cir. 2004) 21, 22, 30

Grand Canyon Trust v. Norton,
2006 WL 167560 (D. Ariz. Jan. 18, 2006).....16, 38

Idaho Farm Bureau Federation v. Babbitt,
58 F.3d 1404 (9th Cir. 1995) 33

Miccosukee Tribe of Indians of Florida v. United States,
566 F.3d 1257 (11th Cir. 2009) 44

Motor Vehicle Manufacturers Association v. State Farm Mutual
Automobile Insurance Co., 463 U.S. 29 (1983) .....passim

National Association of Home Builders v. Defenders of Wildlife,
551 U.S. 644 (2007).....49, 50

National Wildlife Federation v. National Marine Fisheries Service,
524 F.3d 917 (9th Cir. 2008) .....passim

Natural Resources Defense Council v. Evans,
279 F. Supp. 2d 1129 (N.D. Cal. 2003).....44

Natural Resources Defense Council v. Houston,
146 F.3d 1118 (9th Cir. 1998) 20, 48

Natural Resources Defense Council v. Kempthorne,
506 F. Supp. 2d 322 (E.D. Cal. 2007) 30

Natural Resources Defense Council v. Rodgers,
381 F. Supp. 2d 1212 (E.D. Cal. 2005) 23

Nevada v. Herrington,
777 F.2d 529 (9th Cir. 1985) 40

Ocean Advocates v. U.S. Army Corps of Engineers,
402 F.3d 846 (9th Cir. 2004) 59

Oregon Natural Desert Association v. U.S. Forest Service,
465 F.3d 977 (9th Cir. 2006) 40, 56

Oregon Natural Resources Council v. Allen,
476 F.3d 1031 (9th Cir. 2007) 42, 44, 45, 46

Pacific Coast Federation of Fishermen's Associations v. Bureau of
Reclamation, 426 F.3d 1082 (9th Cir. 2005).....20, 25, 34, 43

Pacific Coast Federation of Fishermen's Associations v. Gutierrez,
606 F. Supp. 2d 1122 (E.D. Cal. 2008) 23

Paulsen v. Daniels,
413 F.3d 999 (9th Cir. 2005) 33, 38

Pit River Tribe v. U.S. Forest Service,
469 F.3d 768 (9th Cir. 2006) 20

South Yuba River Citizens League v. National Marine Fisheries Service,
723 F. Supp. 2d 1247 (E.D. Cal. 2010) 23

Sierra Club v. Babbitt,
65 F.3d 1502 (9th Cir. 1995) 49

Sierra Club v. Marsh,
816 F.2d 1376 (9th Cir. 1987) 55

Turtle Island Restoration Network v. National Marine Fisheries
Service, 340 F.3d 969 (9th Cir. 2003) 20, 48-49, 53

TVA v. Hill,
437 U.S. 153 (1978).....3, 48

Upper Snake River Chapter of Trout Unlimited v. Hodel,
921 F.2d 232 (9th Cir. 1990) 58

Western Watersheds Project v. Kraayenbrink,
632 F.3d 472 (9th Cir. 2011) 49

Western Watersheds Project v. Matejko,
468 F.3d 1099 (9th Cir. 2006) 48

Washington Toxics Coalition v. EPA,
413 F.3d 1024 (9th Cir. 2005) 48

Wild Fish Conservancy v. Salazar,
628 F.3d 513 (9th Cir. 2010) .....passim

FEDERAL STATUTES

5 U.S.C. § 551(4) 39, 56

5 U.S.C. § 551(13) 39, 56

5 U.S.C. §§ 701-706.....1

5 U.S.C. § 704 ..... 39, 56

5 U.S.C. § 706(1) 21

5 U.S.C. § 706(2)(A) 20

5 U.S.C. § 706(2)(D) 20

16 U.S.C. § 1532(3) 10, 30

16 U.S.C. § 1532(5) 10

16 U.S.C. § 1532(5)(A) 30

16 U.S.C. § 1532(19) 4

16 U.S.C. § 1533(f)(1) 38

16 U.S.C. § 1533(f)(1)(B) 39

16 U.S.C. § 1533(f)(1)(B)(ii) 15-16

16 U.S.C. § 1533(f)(1)(B)(i)-(iii) 38

16 U.S.C. § 1533(f)(4) 16, 33, 38, 39

16 U.S.C. § 1533(f)(5) 16, 33, 38

16 U.S.C. § 1536(a)(2) 4, 22, 37, 48

16 U.S.C. § 1536(b)(3)(A) 4, 10

16 U.S.C. § 1536(b)(4)(A) 5

16 U.S.C. § 1536(b)(4)(i) 42, 46

16 U.S.C. § 1536(b)(4)(ii) 42

16 U.S.C. § 1536(o) 41

16 U.S.C. § 1536(o)(2) 5

16 U.S.C. § 1538(a)(1)(B) 4, 41

16 U.S.C. § 1538(a)(1)(G) 4

16 U.S.C. § 1540(g)(1)(A) 1, 50

16 U.S.C. § 1540(g)(1)(C) 1, 38

16 U.S.C. § 1540(g)(2) 50

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 2107(b) 1

42 U.S.C.§ 4321 5

42 U.S.C.§ 4332(C) 5, 56

43 U.S.C. § 620 ..... 5, 6

43 U.S.C. § 1501(a) 6

43 U.S.C. § 1552(b) 6, 50

GCPA, Pub. L. No. 102-575 8

GCPA § 1802(a) 8, 50, 51

GCPA § 1804(a) 9

GCPA § 1804(c)(1) 51

GCPA § 1804(c)(1)(A) 9, 50

GCPA § 1804(c)(3) 52

FEDERAL REGULATIONS

40 C.F.R. § 402.14(i)(4) 45

40 C.F.R. § 1501.2 5

40 C.F.R. § 1502.5 5

40 C.F.R. § 1508.9 5

40 C.F.R. § 1508.13 5

40 C.F.R. § 1508.18(a).....57

40 C.F.R. § 1508.18(b)(2).....57

40 C.F.R. § 1508.18(b)(4).....57

40 C.F.R. § 1508.27(b) 59

40 C.F.R. § 1508.27(b)(3).....59

40 C.F.R. § 1508.27(b)(8).....59

40 C.F.R. § 1508.27(b)(9).....59

40 C.F.R. § 1508.27(b)(10).....59

50 C.F.R. § 17.3 4

50 C.F.R. § 402.02 .....passim

50 C.F.R. § 402.03 48

50 C.F.R. § 402.14(a).....49

50 C.F.R. § 402.14(i)(1)(ii)..... 42, 46-47

50 C.F.R. § 402.14(i)(3).....47

50 C.F.R. § 402.14(i)(4).....45

50 C.F.R. § 402.16(a).....42

50 C.F.R. § 402.16(c).....55

OTHER

35 Fed. Reg. 8,951 (June 10, 1970) 6

51 Fed. Reg. 19,926 (June 3, 1986) 49

59 Fed. Reg. 13,374 (Mar. 21, 1994).....passim

59 Fed. Reg. 34,270 (July 1, 1994).....33, 38

62 Fed. Reg. 9,447 (Mar. 3, 1997).....9, 11, 53, 54

70 Fed. Reg. 15,873 (Mar. 29, 2005).....50, 52

137 Cong. Rec. S829 (Jan. 14, 1991) 51

138 Cong. Rec. S17831 (Oct. 8, 1992).....9

H.R. Rep. No. 101-641 (1990).....7, 8

H.R. Rep. No. 102-114 Part 1 (1991) 8, 9

S. Rep. No. 102-267 (1992) 7, 8, 52

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331, 5 U.S.C. §§ 701-706, and 16 U.S.C. § 1540(g)(1)(A), (C). Pursuant to 28 U.S.C. § 2107(b), Appellant filed its Notice of Appeal on May 26, 2011. Excerpts of Record (ER) 1870-73. Final judgment was entered on March 30, 2011. ER 144. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is the U.S. Fish and Wildlife Service's 2009 Biological Opinion unlawful because Glen Canyon Dam operations (a) destroy features of the Colorado River that warranted designating it humpback chub critical habitat and (b) prevent chub spawning and limit the chub's distribution and numbers in the River.

2. Does the court have jurisdiction to review the July 12, 2009 Recovery Goals because the U.S. Fish and Wildlife Service implemented them to approve Glen Canyon Dam operations.

3. Is the U.S. Bureau of Reclamation violating the ESA prohibitions against jeopardy and adverse modification by relying on an illegal Biological Opinion.

4. Is the U.S. Bureau of Reclamation violating the ESA prohibition against take because the 2010 Incidental Take Statement is unlawful and

Reclamation is not implementing nonnative control.

5. Is the U.S. Fish and Wildlife Service's 2010 Incidental Take Statement unlawful because it fails to specify a measurable limit for takings caused by Glen Canyon Dam operations.

6. Must the U.S. Bureau of Reclamation comply with Endangered Species Act and National Environmental Policy Act procedures upon establishing, in its Annual Operating Plans, monthly volumes released from Glen Canyon Dam each year.

ADDENDUM STATEMENT

The attached addendum contains pertinent statutes, regulations, and legislative history.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This appeal concerns the U.S. Bureau of Reclamation's (Reclamation) operation of Glen Canyon Dam (Dam) and its adverse impacts on the humpback chub, a species listed as endangered under the Endangered Species Act (ESA), and on chub critical habitat in the Colorado River. Over thirty years of science has led to the same conclusion: operating the Dam with fluctuating flows eliminates Colorado River habitat that is necessary to ensure the chub's survival and recovery.

Reclamation's Dam operations are governed by "Operating Criteria," issued in 1997 and modified by the 2008 Experimental Plan, and its "Annual Operating Plans" (AOPs). Appellant Grand Canyon Trust (Trust) challenges the U.S. Fish and Wildlife Service's (FWS) 2009 Biological Opinion (2009 BO), 2010 Incidental Take Statement (2010 ITS), and 2009 Recovery Goals (Goals), which combine to approve Reclamation's operations under the 2008 Experimental Plan. The Trust also challenges the AOPs for violating the ESA and National Environmental Policy Act (NEPA). Through this appeal, the Trust requests that the Court vacate FWS's 2009 BO, 2010 ITS, and Goals, and require Reclamation to comply with the ESA and NEPA prior to issuing AOPs.

The district court issued several orders through four rounds of summary judgment briefing. Three orders are on this appeal. To put these orders in context, the Trust included the course of proceedings and disposition below, after the statement of facts.

II. LEGAL BACKGROUND

A. Endangered Species Act

"The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost." TVA v. Hill, 437 U.S. 153, 184 (1978). To accomplish its purpose, the ESA provides several protections for endangered species and their designated critical habitat.

Under ESA section 7(a)(2), a federal agency cannot undertake any action that is "likely to jeopardize the continued existence" of any listed species or "result in the destruction or adverse modification of" critical habitat. 16 U.S.C. § 1536(a)(2). To ensure compliance with these prohibitions, the "action agency" must consult with FWS upon proposing to authorize, fund, or carry out an action that may affect a species or its critical habitat. Id. At the conclusion of the consultation process, FWS provides the action agency with a "biological opinion" as to whether jeopardy or adverse modification is likely to occur. If so, FWS sets forth a "reasonable and prudent alternative" (RPA) that could avoid ESA violations. Id. § 1536(b)(3)(A). FWS must use the best scientific and commercial data available in assessing the proposed action. Id. § 1536(a)(2).

Section 9(a)(1) of the ESA makes it unlawful to "take" a threatened or endangered species of fish or wildlife. 16 U.S.C. § 1538(a)(1)(B), (G). Congress defined "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." Id. § 1532(19). ESA regulations further define "harm" as "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. Congress created two "incidental take" exceptions to section 9's take prohibition. One applies strictly to federal agencies as part of the section 7 process. FWS issues "incidental take

statements" that permit take if the agency action does not result in jeopardy or adverse modification. 16 U.S.C. § 1536(b)(4)(A), (o)(2).

B. National Environmental Policy Act

Congress enacted NEPA to "promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C.§ 4321. NEPA requires federal agencies to analyze and publicly disclose the environmental impacts of proposed actions. 40 C.F.R. §§ 1501.2, 1502.5.

The cornerstone of NEPA is the environmental impact statement (EIS) that must be prepared for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C.§ 4332(C). Federal agencies may first prepare an environmental assessment (EA) to determine whether a project's environmental impacts are significant. 40 C.F.R. § 1508.9. If the EA concludes that a project "may" have a significant impact on the environment, an EIS must be prepared. If not, the federal agency must detail why the project's impacts are insignificant and issue a finding of no significant impact (FONSI). Id. § 1508.13.

III. STATEMENT OF FACTS

A. Glen Canyon Dam

Congress authorized the construction of the Dam through the 1956 Colorado River Storage Project Act. 43 U.S.C. § 620. The Dam divides the Colorado River into the Upper and Lower Basins. Its primary purpose is to store water for the

Upper Basin states, with hydropower generation as a secondary function. Id. Dam construction was completed in 1963, creating Lake Powell. For years, Reclamation operated the Dam to maximize revenues from hydropower generation, causing extreme fluctuations in Colorado River flows downstream of the Dam. ER 840-41.

Congress subsequently enacted the 1968 Colorado River Basin Project Act (1968 Act). Its purpose was to manage Colorado River water for various needs, with "electrical power as an incident of the foregoing purposes." 43 U.S.C. § 1501(a). The 1968 Act required Reclamation to develop operating criteria and annual operating plans for all dams on the Colorado River. Id. § 1552(b). In 1970, Reclamation issued operating criteria that required a minimum release of 8.23 million acre-feet annually from the Dam. 35 Fed. Reg. 8,951 (June 10, 1970).

B. The Dam's Impacts On The Chub

FWS listed the humpback chub as an endangered species in 1973. Chub lived throughout the Colorado River Basin, which was characterized by warm water, fast-moving rapids, sheltered shorelines, and high springtime flows. ER 472-73; ER 193. However, the construction of several dams left seven isolated chub populations in the entire River system, with only two occurring in the Lower Basin in the Colorado River and its tributary, the Little Colorado River (LCR). 59 Fed. Reg. 13,374, 13,376 (Mar. 21, 1994).

The Dam's operation causes numerous impacts to the chub. Young chub depend on shoreline habitats, which serve as sanctuaries with slow river flows, warm water temperatures, and adequate food supply. ER 194, 206, 210. However, Dam operations erode sandbars that would otherwise form in the River, thereby eliminating shoreline habitats. ER 204-07, 209-14; ER 569, 570, 577. In addition, cold river temperatures prevent adult chub from spawning in the Colorado River, result in "cold shock" for young chub when they enter the Colorado River from the LCR, and promote cold-water nonnative fish that prey upon young chub and compete with adults. ER 1669-70, 1675-76.

For these reasons, in a 1978 BO, FWS found Reclamation's Dam operations violated the ESA's "jeopardy" standard "by limiting [the chub's] distribution and population size." ER 171. FWS's 1978 BO concluded that Dam operations cause significant daily flow fluctuations and cold water temperature that restrict chub to the confluence of the Colorado and LCR. ER 168-70.

However, rather than change Dam operations, Reclamation decided in 1982 to study the Dam's impacts. S. Rep. No. 102-267 at 133-34 (1992). These "Glen Canyon Environmental Studies" again found that Dam operations eliminate shoreline habitats and decrease water temperatures. Id. Reclamation still did not change operations. Instead, in 1989, Reclamation announced plans to evaluate operations in an EIS. H.R. Rep. No. 101-641 at 7-8 (1990); ER 437-38.

When the EIS process stalled and studies showed four Grand Canyon fish had been extirpated, members of Congress began proposing bills to address the problem. H.R. Rep. No. 101-641 at 8 (1990) ("[A]fter years of empty promises and mounting evidence that a priceless resource was being negatively impacted, the Committee felt compelled to take strong action."); H.R. Rep. No. 102-114 Part 1, at 88 (1991) ("After over twenty-five years of dam operations . . . the harm resulting . . . has become painfully apparent."). In 1991, fearing Congressional intervention, Reclamation adopted interim operating criteria, called "Interim Flows," which reduced the degree of fluctuating flows. ER 187; ER 255; ER 240.

C. Grand Canyon Protection Act, Operating Criteria, And AOPs

Despite Reclamation's Interim Flows, Congress enacted the Grand Canyon Protection Act (GCPA) in 1992. Pub. L. No. 102-575, 106 Stat. 4600. The GCPA's purpose was to change Dam operations and "prevent damage to downstream resources, principally [from] the dam's power operations." S. Rep. No. 102-267 at 135 (1992); H.R. Rep. No. 102-114 Part 1, at 85-86. The GCPA ordered Reclamation:

> to protect, mitigate adverse impacts to, and improve the values for which Grand Canyon National Park and Glen Canyon National Recreation Area were established, including, but not limited to natural and cultural values and visitor use.

GCPA § 1802(a). In enacting the GCPA, Congress and its chief sponsor, Senator McCain, rejected the prevailing policy that power generation and revenues took

precedence over Grand Canyon's natural, cultural, and recreation resources. H.R. Rep. No. 102-114, Part 1, at 146 ("[P]rotection of the Grand Canyon . . . must not be compromised by the practice of maximizing power generation during peak demand periods each day."); 138 Cong. Rec. S17831 (Oct. 8, 1992) (Sen. McCain confirming purpose was "to ensure that operations of Glen Canyon Dam will stop damaging the downstream resources in Glen Canyon National Recreation Area and Grand Canyon National Park").

To accomplish its purpose, the GCPA required Reclamation to complete the EIS on Dam operations by 1994 and prepare new operating criteria. GCPA § 1804(a), (c)(1)(A). The GCPA also required Reclamation to issue AOPs each year. Id. § 1804(c)(1)(A). GCPA operating criteria and AOPs were "separate and in addition to" those required for all Colorado River dams by the 1968 Act. Id.

Reclamation completed a Final EIS for Dam operations in 1995 and issued its NEPA Record of Decision in 1996. ER 227, 273-87. In 1997, Reclamation selected Modified Low Fluctuating Flows (MLFF) as the Dam's Operating Criteria (62 Fed. Reg. 9,447, 9,448 (Mar. 3, 1997)), which were nearly identical to Reclamation's Interim Flows. ER 188. MLFF permits daily releases that vary by up to 8,000 cubic-feet/second (cfs) and cause river levels to rise and fall 6 feet or more. ER 558; ER 275; ER 840.

D. 1994 Biological Opinion On Dam Operations

Before reviewing the Dam's Operating Criteria, FWS designated the chub's critical habitat in 1994. 59 Fed. Reg. 13,374. The ESA requires FWS to designate an endangered species' "critical habitat," defined as those areas "essential" to recovery. 16 U.S.C. § 1532(5), (3). Chub critical habitat includes two reaches below the Dam: 173 miles of the Colorado River (Reach 7), and eight miles of the LCR upstream from its confluence with the Colorado River (Reach 6). 59 Fed. Reg. at 13,398.

In 1994, Reclamation and FWS underwent ESA section 7(a)(2) consultation on the new Operating Criteria. FWS's 1994 BO concluded that MLFF operations cause jeopardy to the chub and adversely modify the chub's Colorado River critical habitat. ER 186. FWS determined "the likelihood of recovery in the mainstem Colorado River is still appreciably reduced." ER 215. The 1994 BO detailed that MLFF causes daily flows to fluctuate dramatically, prevents the deposition of sand needed to maintain shoreline habitats, keeps water temperatures too cold for spawning and recruitment, and provides conditions for nonnative fish. ER 204-07, 214.

Because the 1994 BO found ESA violations, FWS offered an RPA. See 16 U.S.C. § 1536(b)(3)(A). The RPA ensured Dam operations are ESA-compliant and "[a]ttain[] riverine conditions that support all life stages of endangered and

native fish [] essential to the Colorado River ecosystem." ER 218. The RPA requires Reclamation to implement operations known as Seasonally-Adjusted Steady Flows (SASF). Id. SASF operations mimic natural river flows: high steady flows in the spring and low steady flows in the summer and fall. Id.

Reclamation never implemented SASF, as required. The 1994 BO permitted Reclamation to develop its own SASF program by 1998 as an alternative to the RPA's default SASF program. ER 218-19. Further, the Operating Criteria allow Reclamation to implement SASF. 62 Fed. Reg. at 9,448; ER 280-81 (Reclamation confirmed "preferred alternative [in FEIS] provides for experimental steady flows through the Adaptive Management Program").[1] Nonetheless, Reclamation's only effort to comply with the RPA took place in 2000, when it implemented "low summer steady flows" (LSSF) between March and September. ER 822; ER 338 (purpose of LSSF experiment was to "prepare Reclamation to pursue the element of the reasonable and prudent alternative"). Despite this and other Reclamation actions,[2] FWS found in 2006 that the RPA "has not been carried out" and "little to

[1] The Operating Criteria also called for the creation of an Adaptive Management Working Group (AMWG) to help study and develop experimental steady flows, among other things. ER 1162.

[2] Reclamation undertook "beach habitat building flows" (BHBFs), or high flow experiments, "to rebuild high-elevation sandbars [and] restore backwater channels." ER 826. BHBFs release up to 45,000 cfs for a short duration, whereas MLFF releases between 5,000 and 25,000 cfs. BHBFs in 1996, 1997, and 2004 failed because subsequent MLFF operations destroyed newly-created shoreline habitats. ER 831 ("newly created habitats [by building flows in 1996] disappeared

no progress has been made in the stabilization of flows for the benefit of humpback chub." ER 752, 755. From 1994 through August 2007,[3] FWS maintained that Reclamation must implement the RPA to comply with the ESA. ER 308; ER 289-90; ER 443; ER 319.

Meanwhile, the status of the chub and its Colorado River critical habitat did not improve. In 2005, the U.S. Geological Survey (USGS) completed a report on the State of the Colorado River (SCORE Report), and published a related peer-reviewed report in 2007. ER 542, 759. The USGS detailed that "[r]esearch and monitoring have conclusively demonstrated a net loss of fine sediment from the Colorado River ecosystem under [] MLFF." ER 574, 672. The USGS concluded that "[t]he much hoped for outcome of modest improvement in sand bar resources, as originally proposed and predicted in the EIS, has not been realized." ER 765. The agency observed that while MLFF provides an economic benefit from hydropower revenues, "these benefits apparently come at the expense of environmental goals tied to downstream sand resources and related habitats." ER 766. The USGS also found that "dam operations during the last 10 [years]

---

within two weeks"); ER 1204 ("most of these newly created habitats disappeared within two weeks due to reattachment bar erosion"); ER 1054 ("sandbars and backwaters reverted back to their previous [degraded] state"). In addition, from 2003 to 2006, Reclamation took actions to eliminate nonnative fish. ER 822, 826. Though successful, this did not satisfy the RPA because the chub's Colorado River habitat was not restored.

[3] In August 2007, FWS voted at an AMWG meeting to implement SASF during the forthcoming water year. ER 1083; ER 1065, 1070-72.

under the preferred alternative of the MLFF have not restored fine-sediment resources or native fish populations in Grand Canyon." ER 597, 666.

IV. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The Trust filed suit against Reclamation on December 7, 2007. ER 1882. The Trust alleged Reclamation's ongoing Dam operations under MLFF violated the ESA's jeopardy, adverse modification, and take prohibitions, and Reclamation had failed to comply with ESA and NEPA procedures before issuing AOPs. On February 15, 2008, the Trust moved for summary judgment on all claims. ER 1883.

Just two weeks later, on February 29, 2008, Reclamation adopted a 5-year Experimental Plan and FWS issued a new BO (2008 BO) on Reclamation's Dam operations. ER 1219, 1160.[4] The 2008 Experimental Plan modified the Dam's Operating Criteria by adopting steady daily flows during September and October of each year, while continuing with MLFF the rest of the year. ER 1229.[5]

The 2008 BO on the Experimental Plan reversed the agency's longstanding position that MLFF causes jeopardy and adverse modification. ER 1210. FWS

[4] Reclamation prepared an EA and FONSI for the 2008 Experimental Plan (ER 1219), which was challenged and upheld by the district court. ER 48-57.

[5] The Experimental Plan also included a BHBF in March 2008. ER 1229. As with prior BHBFs, fluctuating flows afterward destroyed newly-created shoreline habitats. ER 1771.

claimed the 2008 BO "replaces" the 1994 BO. ER 1161; ER 817 (email indicating Experimental Plan would "get rid of the [1994] BO").

The Trust supplemented its complaint to address these and subsequent agency actions resulting from court orders. ER 1905, 1911; ER 1803-39.

A. District Court Ruling On AOPs

On September 26, 2008, in response to the summary judgment motion, the district court deferred ruling on the Trust's jeopardy, adverse modification, and take claims against ongoing Dam operations until the 2008 BO was adjudicated. ER 11-12.

The district court did rule, however, on the AOP claims, holding they are not subject to ESA or NEPA procedures. ER 12-28. According to the court, AOPs do not decide how Reclamation operates the Dam and thus were not agency actions under the ESA or major federal actions under NEPA. The court denied two requests to certify these claims for appeal, precluding the Trust from appealing the court's ruling on AOPs while Reclamation continued to issue several new AOPs during the course of the litigation. ER 1614, 1780-84.

B. District Court Ruling On The 2009 BO

On May 26, 2009, the district court ruled the 2008 BO was illegal. ER 57-63. The court found FWS failed to assess the impact of MLFF on the chub, its critical habitat, and recovery. ER 60-62. The court's decision was also based on

the overwhelming scientific evidence demonstrating that MLFF operations continue to destroy chub habitat. ER 58-59 (finding 2008 BO was "sharp departure from FWS's longstanding opinion" "without directly addressing the effect of MLFF on the chub or its habitat"); ER 69 ("Virtually all of the science contained in the administrative record concludes that MLFF releases from the Dam destroy or adversely modify nearshore habitat."). The court ordered FWS to issue a new BO, and again deferred ruling on the Trust's ESA claims against Reclamation until the remanded BO was resolved. ER 74-76.

On October 29, 2009, FWS issued the 2009 BO, again concluding Dam operations do not cause jeopardy or adverse modification. ER 1626, 1698. Like in years past, FWS found that MLFF destroys the chub's Colorado River critical habitat, including those habitat features for spawning, nursery, and feeding areas. ER 1670, 1675, 1691-92, 1644. Because it was undisputed that MLFF harms the chub's Colorado River habitat, FWS supported its conclusions by relying on (1) the chub's population status in the LCR, a tributary unaffected by Dam operations, and (2) control of warm-water nonnatives through MLFF. ER 1686-88.

To justify reliance on the chub's LCR population, which the district court had questioned in vacating the 2008 BO (ER 62), FWS cited the unfinished chub Recovery Goals. ER 1455. The previous version of the Goals from 2002, which were developed to provide "objective measurable criteria" (16 U.S.C.

§ 1533(f)(1)(B)(ii)), had been vacated because they failed to include "time and costs estimates." Grand Canyon Trust v. Norton, 2006 WL 167560, at *4 (D. Ariz. Jan. 18, 2006). The court required FWS to correct these legal errors before issuing new goals. See id. However, FWS did not fix these defects nor submit them for peer or public review before implementing them in the 2009 BO, as required.[6] Moreover, chub experts were highly critical of the 2002 Goals, finding them "grossly inadequate" and "meager." ER 513, 516, 521.[7]

The Goals articulate two "standards" for recovery: "demographic criteria" and "mainstem recovery factor criteria." ER 1694. The demographic criteria are met when the "Grand Canyon population," long known to be limited to the LCR, "exceeds 2,100 adults." ER 1517-18. The mainstem criteria are achieved by meeting the same standard. Although they require "[a]dequate habitat and range for recovered populations," including "[a]dequate spawning habitat and appropriate spawning cues," "[a]dequate nursery habitat," and "[a]dequate juvenile and adult habitat," "adequacy" is measured by the demographic criteria of 2,100 adults. ER 1520. Applying the demographic criteria to the LCR, FWS was able to ignore MLFF's destruction of critical habitat in the Colorado River. The Trust supplemented its Complaint again to challenge the 2009 BO and the Goals. ER 80.

---

[6] See 16 U.S.C. § 1533(f)(4), (5); ER 299 (ESA Handbook explaining peer review ensures information used "is reliable, credible, and represents the best scientific and commercial data available").

[7] See also ER 803-07; ER 679-84; ER 695-99; ER 808; ER 782-83.

On June 29, 2010, the district court upheld the 2009 Biological Opinion. ER 81-110. In many ways, the court's reasoning conflicted with its prior reasoning a year earlier. The court found that FWS considered chub recovery and could rely on the LCR population. The court also found support for FWS's conclusion that MLFF operations control nonnatives. Although the court upheld FWS's reliance on the Goals, the court found it lacked jurisdiction to review the Goals' ESA violations. ER 116-20. Upon finding the 2009 BO valid, the court also held Reclamation's Dam operations did not result in jeopardy or adverse modification. ER 120-23.

Although the court upheld the 2009 BO, it found the accompanying ITS violated the ESA. ER 110-14. In the 2009 ITS, FWS determined MLFF operations take young chub, but authorized the taking of 4,150 adult chub and an unknown number of young chub. ER 1636, 1639, 1705.[8] The court held FWS's 2009 ITS violated the ESA in two respects, and remanded for a new ITS. ER 110-14.

C. District Court Ruling On The 2010 ITS

On September 1, 2010, FWS issued the 2010 ITS, which is the ITS at issue in this appeal. ER 1797-1802. In the 2010 ITS, FWS claimed take of young chub

[8] FWS's 4,150 chub take limit is derived from the so-called "reconsultation trigger." ER 1636, 1639, 1705. This trigger mandates re-consultation when the adult population in the LCR drops to 3,500 fish from the 2009 estimate of 7,650 chub. See id.

in the Colorado River could not be quantified and authorized the taking of 1,750 adult chub in the LCR as a take surrogate. ER 1798-99.[9]

In addition, the 2010 ITS assumed mechanical removal would minimize take resulting from cold-water nonnative predatory fish. ER 1801. However, six months earlier, in March 2010, Reclamation had indefinitely cancelled this means of nonnative control. ER 106. Absent mechanical removal, Dam operations kill approximately 10,000 chub annually through predation. ER 1840, 1857, 1861. Such takings are not accounted for in the 2010 ITS.[10]

The district court upheld the 2010 ITS on March 30, 2011. The court rejected the Trust's contentions that (1) takings could be quantified, (2) the take surrogate was invalid, and (3) the lack of minimization measures was not justified. ER 132-40. Upon finding the 2010 ITS lawful, the court also ruled Reclamation's Dam operations were not violating the ESA take prohibition. ER 142-43.

---

[9] The authorized amount decreased because FWS changed the reconsultation trigger from 3,500 adult chub to 6,000. ER 1798-99.

[10] On November 1, 2010, FWS issued another ITS to temporarily permit takings associated with Dam operations absent nonnative removal efforts. ER 1859-62. That ITS expired on April 30, 2011, and is not at issue in this appeal. It assumed Reclamation would resume nonnative fish controls by May 1, 2010, which did not happen, nor have the agencies reconsulted regarding the cancellation of nonnative control, as they had represented. ER 127-28. FWS's ongoing illegal takings are the subject of the Trust's Motion for Injunction Pending Appeal before this Court. See Dkt. 40-1 (appellate docket).

SUMMARY OF THE ARGUMENT

FWS's 2009 BO and 2010 ITS violate the ESA. FWS's no jeopardy conclusion contradicts the best available science indicating MLFF precludes or limits chub reproduction, numbers, and distribution in the Colorado River. FWS's no adverse modification conclusion is contrary to the best available science indicating MLFF significantly alters the habitat features in the Colorado River that FWS found essential for chub survival and recovery. FWS's reliance on the LCR population ignores the impacts to the chub's Colorado River critical habitat, and does not explain its departure from prior conclusions and over 30 years of science. FWS's findings in its 2010 ITS, including claims that (1) take cannot be quantified, (2) the adult LCR population provides a take surrogate, and (3) minimization measures are unnecessary, are contrary to the ESA and the best available science in the record.

Reclamation's Dam operations violate the ESA. Reclamation has failed to ensure against jeopardy and adverse modification because the 2009 BO is unlawful. Reclamation is unlawfully taking chub because the 2010 ITS is illegal and the agency cancelled nonnative controls.

The Court has jurisdiction to review the Goals under the ESA and APA because FWS implemented them in the 2009 BO.

Reclamation's AOPs must comply with ESA and NEPA procedures. AOPs are discretionary actions wherein Reclamation chooses the monthly volumes released from the Dam. Whereas high monthly volumes harm the chub's Colorado River habitat, Reclamation may reduce an AOP's impact on the chub by selecting lower monthly volumes. An AOP is thus an "agency action" and a "major federal action" that may impact the chub and natural resources in Grand Canyon National Park.

STANDARD OF REVIEW

The Court reviews a ruling on summary judgment and final agency decisions de novo. Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998); Pac. Coast Fed'n of Fishermen's Ass'n v. Bureau of Reclamation (PCFFA), 426 F.3d 1082, 1090 (9th Cir. 2005).

The Court reviews Reclamation and FWS's violations of the ESA and NEPA under the Administrative Procedure Act (APA). Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340 F.3d 969, 973 (9th Cir. 2003); Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 778 (9th Cir. 2006). Reclamation's AOPs and FWS's 2009 BO and 2010 ITS shall be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or are "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). Moreover,

if the Court finds Reclamation "unlawfully withheld" compliance with the ESA and NEPA prior to adopting AOPs, the Court "shall compel" such compliance. Id. § 706(1).

ARGUMENT

I. FWS'S 2009 BIOLOGICAL OPINION IS UNLAWFUL

FWS's 2009 BO concluded Dam operations under the Experimental Plan, and in particular MLFF, do not jeopardize the chub or adversely modify its Colorado River critical habitat. "Jeopardy" results when the action "reduce[s] appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. "Destruction or adverse modification of critical habitat" is defined as:

> a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

Id.[11] The habitat "features" are known as "primary constituent elements" (PCEs). In designating 173 miles of the Colorado River as critical habitat, FWS identified the following PCEs:

---

[11] This Court held that reliance on this regulation was unlawful because it limits the analysis to survival, as opposed to recovery. Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv., 378 F.3d 1059, 1069 (9th Cir. 2004). The Court

> (1) "Water" (W1 and W2): water of sufficient quality (i.e. temperature) that is delivered in sufficient quantity to a specific location in accordance with a hydrologic regime that is required for the particular life stage for the chub;
>
> (2) "Physical Habitat" (P1-P4): areas that are already inhabited or potential habitable areas for use in spawning, nursery, feeding, or corridors between those areas; and
>
> (3) "Biological Environment" (B1-B3): adequate food supply and a natural balance of predation and competition from nonnative species.

59 Fed. Reg. at 13,378. In evaluating jeopardy and adverse modification, FWS must use the "best scientific and commercial information available." 16 U.S.C. § 1536(a)(2). Moreover, FWS must analyze the action's impacts on "recovery," as well as survival. Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv., 378 F.3d 1059, 1070 (9th Cir. 2004); Wild Fish Conservancy v. Salazar, 628 F.3d 513, 518 (9th Cir. 2010).

As detailed in the 2009 BO and all other findings since 1978, Dam operations: (1) prevent shoreline habitats from forming while destroying existing ones, (2) keep Colorado River temperatures too cold, and (3) provide habitat for cold-water nonnative predators. In the Colorado River, chub are generally unable to reproduce or "recruit" (grow to adulthood), chub distribution is restricted primarily to the LCR, and chub numbers are severely reduced. Further, the 173

---

did not vacate the regulation, and "did not alter the rule that an 'adverse modification' occurs [] when there is a 'direct or indirect alteration that appreciably diminishes the value of critical habitat.'" Butte Envtl. Council v. U.S. Army Corps of Eng'rs, 620 F.3d 936, 948 (9th Cir. 2010) (emphasis omitted).

miles of chub critical habitat in the Colorado River is not functioning because Dam operations eliminate most or all of its PCEs.

Accordingly, as detailed below, FWS's no-jeopardy and no-adverse modification conclusions have no "rational connection" to the record evidence. See Wild Fish Conservancy, 628 F.3d at 525-29.[12]

A. Jeopardy: The BO Demonstrates That MLFF Prevents Spawning And Reduces Distribution And Numbers In The Colorado River

The best science in the record and 2009 BO continues to show Dam operations reduce chub survival and recovery in the Colorado River. Adult chub are generally unable to spawn there, and young chub do not survive to adulthood. ER 1690 (MLFF's "cooling effect" "limits the suitability of the mainstem to provide for successful spawning and rearing of humpback chub in the mainstem"); ER 1631 ("nursery habitat and survivorship is poor"); ER 1632 ("lack of suitable nursery habitats for young humpback chub in the mainstem Colorado River has long been identified as a likely cause of the decline of the species"). Below the Dam, chub spawning and recruitment is restricted to the LCR. ER 1664 (LCR "is

[12] Numerous district courts have set aside biological opinions where the no-no-jeopardy and no-adverse modification conclusions are inconsistent with the facts in the record. See, e.g., Ctr. for Biological Diversity v. Salazar, 2011 WL 2160254, at *10 (D. Ariz. May 28, 2011); S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv., 723 F. Supp. 2d 1247, 1276 (E.D. Cal. 2010); Pac. Coast Fed'n of Fishermen's Assn's v. Gutierrez, 606 F. Supp. 2d 1122, 1167, 1172-73 (E.D. Cal. 2008); Ctr. for Biological Diversity v. BLM, 422 F. Supp. 2d 1115, 1121 (N.D. Cal. 2006); Natural Res. Def. Council v. Rodgers, 381 F. Supp. 2d 1212, 1232 (E.D. Cal. 2005).

the primary spawning and rearing area for the Grand Canyon population"). This chub "aggregation" located in the LCR and confluence with the Colorado River constitutes almost the entire "Grand Canyon population." ER 1668 ("the population estimate produced for the population, currently estimated at 7,650 adult fish, is essentially the LCR inflow aggregation").

In upholding the 2009 BO, the district court referenced evidence that there had been limited spawning over the years at certain locations in the Colorado River. ER 93-94, 123; see also ER 66-67. Significantly, although FWS described these aggregations, it did not rely on them to support the 2009 BO. See ER 1698-1704.[13] According to the BO, "[t]he contribution of mainstem aggregations, other than the LCR Inflow aggregation, to the overall Grand Canyon population [is] not known, but is thought to be small." ER 1652. Moreover, that evidence of spawning is limited to unique events in the Colorado River.[14] Accordingly, to the extent the district court's decision depended on these aggregations, it committed

---

[13] The largest aggregation is estimated to be 98 adult fish. ER 1668.

[14] For example, "the only documented evidence of reproduction" had been "in a thermal riverside spring." ER 1564; ER 1425 (documenting spawning in "a warm spring adjacent to the colder mainstem). Chub spawning was also positively affected by unprecedented drought, when water temperatures were at their highest since the 1970s. ER 774; ER 1657; ER 998. One study found an aggregation may have spawned during the LSSF in 2000, which "provided more suitable habitat than during MLFF." ER 505-06, 508. Yet, even in these aggregations, there is no evidence that these chub survived and recruited to adulthood. ER 1564; ER 748 (2006 study confirming "little to no humpback chub reproduction or recruitment occurring in the main-stem Colorado River").

legal error. PCFFA, 426 F.3d at 1091 ("[a]n agency's action must be upheld, if at all, on the basis articulated by the agency itself").

The chub's inability to spawn, feed, and grow in the Colorado River is not new. Based on the same evidence concerning impacts from Dam operations, FWS issued jeopardy BOs in 1978 and 1994. Because the best available science continues to demonstrate that the chub's reproduction, numbers, and distribution are severely limited or precluded, Dam operations continue to jeopardize the chub in the Colorado River. In sum, FWS's no-jeopardy conclusion "runs counter" and has no "rational connection" to the evidence. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 57 (1983); Wild Fish Conservancy, 628 F.3d at 525-29.

B. Adverse Modification: The BO Demonstrates MLFF Adversely Modifies Habitat "Features" Essential For The Chub's Colorado River Critical Habitat

Chub cannot survive or recover in the Colorado River because Dam operations adversely modify the features that warranted designating 173 miles of the Colorado River as critical habitat. The best available science has consistently shown that chub PCEs do not function there.

First, as the 2009 BO explains, MLFF's daily fluctuations eliminate nearshore habitats that provide nursery (P2) and feeding (P3) areas for young chub. ER 1691 (MLFF "has an adverse effect of eroding sediment out of the system");

ER 1685 (MLFF "also increases erosion of sandbars and backwaters, which could result in a reduction in habitat quality for juvenile humpback chub"); ER 1653 ("Habitats formed by fine substrates such as backwaters that may be important nursery habitats are negatively impacted by the reduction in sediment supply and constant scour of periodic changes in flow volume . . . ."). Fluctuating flows also "dewater [nearshore] habitats daily" such that young chub may be displaced from or are stranded in nursery (P2) and feeding (P3) areas. ER 1684. In addition, MLFF "may have a negative effect on food availability [B1] in nearshore habitats, reducing food base of juvenile humpback chub." ER 1685; ER 1684; ER 1692.

Second, MLFF keeps the Colorado River artificially cold (W1). Cold water precludes spawning (P1) in the Colorado River, absent unique circumstances. ER 1690. Cold water also kills young chub. ER 1669-70, 1690. The BO explains:

> Young humpback chub that are washed into the mainstem [from the LCR] are subjected to a drastic change in water temperature . . . . This results in thermal shock of young fish, and a reduction in swimming ability, which also increases their vulnerability to predation.

ER 1670 (internal citations omitted).

Third, MLFF causes predation (B2) and competition (B3) from nonnative fish species to be out of balance. ER 1632 ("Predation and competition from nonnative fishes is a significant, and perhaps the most significant, threat to humpback chub."); ER 1653 ("Nonnative fish species, most notably rainbow trout, channel catfish and carp, are established in the river in Marble and Grand

canyons . . . ."). Because Reclamation is not controlling these cold-water nonnatives, Dam operations have killed 20,000 young chub in the last two years. ER 1857.

For all these reasons, MLFF is adversely modifying the entire 173-mile stretch of critical habitat in the Colorado River, which is 96% of the chub's critical habitat below the Dam.[15] Chub are unable to survive, let alone recover, in the Colorado River. This distinguishes the BO from the one upheld in Butte Environmental Council, where the court found the amount of critical habitat affected was "very small" – 5.4% or less of each critical habitat unit at issue. 620 F.3d at 948.

The impacts described in the 2009 BO to chub critical habitat have not changed since the 1994 BO's adverse modification conclusion and have been confirmed by numerous studies since. See, e.g., ER 450 (2002 USGS study finding "releases from Glen Canyon Dam are continuing to erode sandbars and beaches in the Colorado River in Grand Canyon National Park"); ER 666 (2005 USGS SCORE Report concluding "the current MLFF operation has not resulted in increased survival and recruitment of humpback chub"); ER 594 ("mortality is extremely high in the mainstem" for young chub because of fluctuating, non-seasonal flows); ER 592 (below Dam, chub "rel[y] on the [LCR] as the primary

[15] There are 181 miles of chub critical habitat below the Dam, of which eight miles are in the LCR. ER 1649, 1651.

spawning and juvenile-rearing habitat"); ER 672 ("restoration of sand-based, nearshore habitats, termed 'backwaters,' has also not been realized. . . under the strategy of MLFF and hydrologically triggered experimental high flows"); ER 753 (FWS scientist in 2006 noting "[t]hese citations, and many others, support the premise that daily fluctuations are detrimental to native fish populations"); ER 759 (2007 USGS report finding "recent science has documented a continued decline of environmental resources of the Colorado River below Glen Canyon Dam"); ER 1303 (2008 USGS publication concluding "dam releases that vary seasonally and daily . . . are not optimal for retaining sand on the river bed prior to redistribution to higher elevations by high flow events"). Reviewing this evidence, the district court agreed that "[v]irtually all of the science contained in the administrative record concludes that MLFF releases from the Dam destroy or adversely modify nearshore habitat." ER 69.

In sum, the best available science demonstrates that MLFF causes "direct alterations" to nearly all of the essential features of "water," "physical habitat," and "biological environment" in a way that "appreciably diminishes" the value of the chub's Colorado River critical habitat for survival or recovery. See 50 C.F.R. § 402.02 (adverse modification occurs when the action "appreciably diminishes" "any" essential feature); Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv. (NWF), 524 F.3d 917, 934-35 (9th Cir. 2008) (rejecting biological opinion where

FWS failed to consider impacts to one essential critical habitat feature). Accordingly, FWS's no-adverse modification conclusion "runs counter" to the evidence and has no "rational connection" with the best available science in the record. State Farm, 463 U.S. at 43, 57; Wild Fish Conservancy, 628 F.3d at 525-29.

C. The Status Of The Chub's LCR Population Does Not Support FWS's Changed Conclusions

Because evidence that Dam operations adversely modify chub habitat in the Colorado River is irrefutable, FWS primarily relies on the approximately 7,650 adult chub in the LCR to support its 2009 BO and its changed position from the 1994 BO. ER 1699. In doing so, FWS also cites to the criteria established in its unfinished Recovery Goals. ER 1677-78, 1699. For many reasons, reliance on the LCR population is illegal and does not support FWS's conclusions.

First, the existence and size of the LCR population is not new information that would justify a change from the 1994 BO or support the 2009 BO. In the 1994 BO, the situation was the same: the LCR was the only place below the Dam where chub were able to spawn and recruit and the LCR population was of a similar size. ER 191, 209; see also ER 1699. As FWS noted in designating chub critical habitat in 1994, "[h]umpback chub populations in the Little Colorado River . . . appear relatively stable in number of fish." 59 Fed. Reg. at 13,374.

Second, by relying on the LCR population, the 2009 BO renders meaningless 173 miles of chub critical habitat in the Colorado River, which FWS determined is "essential" for chub survival and recovery. See 16 U.S.C. § 1532(5)(A), (3). This Court has recognized the importance of all designated critical habitat, even if a species could live outside of it:

> [s]uitable alternative habitat . . . is no substitute for designated critical habitat. . . . If it were, then the Court in TVA would have allowed the completion of the Tellico Dam and simply required that the snail darter be moved to the suitable alternative habitat.

Gifford Pinchot, 378 F.3d at 1076 ("That the spotted owl has suitable alternative habitat . . . has, strictly speaking, no bearing on whether there is adverse modification of critical habitat."). Here, too, the LCR critical habitat in Reach 6, where the LCR population can spawn and recruit, is no substitute for the chub's Colorado River critical habitat. Therefore, unless FWS modifies the chub's critical habitat designation, FWS cannot simply ignore the Colorado River and rely on the LCR population. As the Gifford Pinchot court noted, "[i]f the FWS wants to change the boundaries of the critical habitat, it might do so if permitted by law after notice and comment procedures." Id.[16]

---

[16] Similarly, a district court rejected a biological opinion that analyzed the areas in which the species was concentrated rather than the boundaries of critical habitat. Natural Res. Def. Council v. Kempthorne, 506 F. Supp. 2d 322, 381-82 (E.D. Cal. 2007). The court held that "[a]bsent any alterations to the critical habitat designation, the agency must address in the BiOp the full extent of impacts to the currently designated critical habitat." Id. at 382.

Regardless of the LCR's population status, FWS has violated the ESA because there is no evidence that the chub can survive and recover in its Colorado River critical habitat. FWS has not even established recovery benchmarks there. See Wild Fish Conservancy, 628 F.3d at 527 (rejecting BO because "[t]he Service has not determined when the tipping point precluding recovery of the Icicle Creek bull trout population is likely to be reached, nor, necessarily, whether it will be reached as a result of" the action); NWF, 524 F.3d at 936 ("[i]t is only logical to require that the agency know roughly at what point survival and recovery will be placed at risk before it may conclude that no harm will result").[17]

---

[17] FWS's claim that more information on the Colorado River (ER 1703) is needed is disingenuous and violates the best available science standard. See, e.g., Conner v. Burford, 848 F.2d 1441, 1453-54 (9th Cir. 1988) (agency improperly ignored "extensive [available] information about the behavior and habitat of the species in the areas covered by the [project]"). It is widely known that the chub needs slow-moving backwater habitats and warmer water temperatures in the Colorado River to survive and recover. FWS's 1994 critical habitat designation identified the specific habitat features the chub requires in the Colorado River. 59 Fed. Reg. at 13,378. Further, more than 25 federal, state, and private scientists concluded in 2007:

> The single most important condition that would benefit the endangered humpback chub in the near term is warming mainstem nearshore habitats, although control of nonnative species is also very important.

ER 979, 981-82; see also ER 755 (FWS scientist stating that recruitment increase "may require a combination of prolonged steady flows, prolonged warming of mainstem waters, and mechanical removal of non-native fish").

Third, because there is no evidence that MLFF affects the LCR population, the LCR population does not reflect the impact of Dam operations. That the LCR population is stable simply means that Reach 6 of the chub's critical habitat is functioning, not Reach 7. Indeed, FWS acknowledged that "MLFF should have minimal effect on PCEs" in the LCR. ER 1702-03. FWS also recognized that "[t]he exact causes of the increase in recruitment, and whether it is attributable to conditions in the mainstem or in the Little Colorado River are unclear." ER 1688, 1699; ER 1401 (noting "factors driving the estimated [population] increase . . . are not easy to determine" and may be related to either "human-caused and natural events" or some combination). Notably, the LCR population has both increased and decreased during releases of MLFF-type flows, which started with Interim Flows in 1991. ER 1639 (chub population declined from 8,900-9,800 in 1989 to 4,500-5,700 in 2001, and increased to 7,650 in 2009); ER 1699 (population increase may have started in mid to late-1990s).

Fourth, FWS and other agencies have repeatedly recognized that the LCR population is vulnerable to a catastrophic threat, which could extirpate the entire population below the Dam. ER 204 ("Reduction in the quality or vitality of the only significant breeding and nursery area for the Grand Canyon humpback chub, the LCR, through catastrophic or adverse chronic event is a considerable threat to the survival of the Grand Canyon population."); ER 806; ER 1356-57; ER 1612.

Finally, FWS's use of the Goals to support its reliance on the LCR population is unlawful because they were incomplete. See ER 1699, 1704. The Goals did not go through a public notice and comment period, procedures required by both the ESA and APA. See 16 U.S.C. § 1533(f)(4) (requiring notice and comment before recovery plan finalized); id. § 1533(f)(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)."); Paulsen v. Daniels, 413 F.3d 999, 1005 (9th Cir. 2005) ("It is antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later."). FWS also failed to submit the Goals for peer review before implementation. 59 Fed. Reg. 34,270 (July 1, 1994); ER 1370; ER 1433. These procedures ensure the Goals represent the best science available. 59 Fed. Reg. at 34,270 ("[i]ndependent peer review . . . ensure[s] the best biological and commercial information is being used in the decisionmaking process"). FWS's failure to follow the procedures renders the Goals, and thus the portions of the 2009 BO that relied on the Goals, unlawful. In a similar situation, this Court rejected a final listing rule where FWS relied on a draft USGS study to support the rule without providing for public comment on the draft study. Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1404, 1402-04 (9th Cir. 1995). Here, too, FWS's

reliance on the Goals illegally avoided the scrutiny necessary to claim the Goals represent the best scientific information available.

D. FWS's Findings Regarding Predatory Nonnatives Are Unsupported

Both warm and cold-water nonnative fish threaten the chub. In the 2009 BO, FWS determined that nonnative fish are considered "a significant, and perhaps the most significant, threat to humpback chub" because they prey on young chub. ER 1632. The 1994 and 1978 BOs also recognized this threat. ER 208, 214; ER 171.

However, the 2009 BO found this predation threat was alleviated. FWS relied on Reclamation's commitment to control cold-water nonnatives through mechanical removal of these fish. ER 1637, 1701. FWS also claimed there is new information demonstrating MLFF has a "beneficial effect" because it keeps the Colorado River too cold for warm-water nonnatives. ER 1704. These two findings are unlawful.

First, FWS's reliance on the conservation measure of controlling cold-water nonnatives violates the ESA. Measures to mitigate adverse impacts must involve "binding plans" that are "reasonably specific, certain to occur, and capable of implementation." NWF, 524 F.3d at 935-36; Ctr. for Biological Diversity v. Rumsfeld, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002); see also PCFFA, 426 F.3d at 1093 n.5 (beneficial effects have to be "reasonably certain to occur," citing 50

C.F.R. § 402.02). At the time of the 2009 BO, FWS was well aware that controlling nonnatives via mechanical removal was not "certain to occur" due to objections raised by the Zuni Tribe. See ER 1448, 1451; ER 1421; ER 1616; ER 1619; ER 1452-54. And, in fact, Reclamation cancelled mechanical removal indefinitely in March 2010 because of these concerns, resulting in 10,000 chub being killed each year since. ER 1773-74, 1840, 1857.[18] Accordingly, due to MLFF operations, cold-water nonnatives remain a "significant threat" to the chub in the Colorado River.

Second, FWS's claim that "MLFF may have a beneficial effect to humpback chub by cooling the mainstem river, which suppresses nonnative fishes" (ER 1704), fails to reconcile the harm cold water causes the chub. See State Farm, 463 U.S. at 43. Simply put, if the chub cannot spawn or survive in the Colorado River under MLFF, it is irrelevant whether warm-water predators are present. As detailed above, chub need warm-water, nearshore habitats to survive and reproduce. ER 1670.[19] FWS does not attempt to reconcile the harms caused by cold water and fluctuating flows with its conclusion that MLFF provides "benefits"

---

[18] Should mechanical removal resume, the best available science shows that warm-water nonnatives could also be controlled. ER 161-62, 1775-77.

[19] Indeed, every time the Colorado River has been warmed over the past decade, the chub's status has apparently improved. The 2009 BO credits the 2000 LSSF experiment and the prolonged drought in the early 2000s as possibly contributing to the LCR population increase. ER 1655, 1669, 1699. As noted above, scientists convened by USGS unanimously concluded that warmer water

by controlling warm-water nonnatives. See Wild Fish Conservancy, 628 F.3d at 526-27.[20]

Moreover, FWS's support for the proposition that MLFF "benefits" the chub is based on reports from different river systems. ER 1686, 1699. According to FWS, warm-water nonnatives, particularly smallmouth bass, caused the "collapse" of chub populations in Colorado's Yampa River and Utah's Desolation and Gray canyons in the Green River. ER 1686.

However, neither report supports FWS's speculation about warm-water nonnatives. For one thing, the Desolation/Gray study does not attribute the chub's decline to nonnatives. ER 739, 743 ("it is not likely that an effect" from smallmouth bass on humpback chub "would have been detectable during the study period"). Further, extremely low flows in the Yampa River during a drought year (ER 1676-77) likely led to the rise of smallmouth bass populations and the collapse of the chub population there. ER 911. During that summer, river flows declined to 4-7 cfs and river temperature rose significantly. ER 1617. Such low flows, and water temperatures, are not possible in the Colorado River, which must run

---

temperatures were the most important step to recovering chub. See ER 979, 981-82. And if the chub LCR population decreases, FWS recommends an increase in steady flows, which will warm the nearshore habitats. ER 1626, 1636.

[20] In analyzing the fall steady flows in the 2008 BO, FWS recognized that steady flows may provide chub with a "competitive advantage" over nonnative fish because the steady flows would provide more habitat for chub than for nonnatives. ER 1205-06.

between 5,000 and 25,000 cfs year-round. ER 1629. FWS never explained how these two river systems were comparable or whether smallmouth bass populations would proliferate in the Colorado River as in the Yampa. See ER 910 (impacts of nonnative fish subject to numerous factors).

In sum, threats from cold-water nonnatives have not been eliminated, and FWS's reliance on MLFF's "benefit" is unsupported by the record.

II. RECLAMATION VIOLATED ITS DUTY TO AVOID CAUSING ADVERSE MODIFICATION AND JEOPARDY

Reclamation has a "substantive duty" to ensure that its actions are not likely to cause jeopardy or adverse modification. 16 U.S.C. § 1536(a)(2); Wild Fish Conservancy, 628 F.3d at 532. Reclamation violated these ESA prohibitions and committed legal error by relying on the flawed 2009 BO.

As detailed above, the 2009 BO's conclusions contradict the scientific evidence in the record. MLFF precludes reproduction and significantly reduces the numbers and distribution of the chub in the Colorado River, the very definition of jeopardy. 50 C.F.R. § 402.02. MLFF also prevents Colorado River critical habitat from functioning for the chub, precluding survival and recovery there. See id. Further, absent the 2009 BO, the 1994 BO would still be in place, meaning Dam operations violate ESA section 7 and Reclamation would be required to implement SASF to avoid jeopardy and adverse modification. ER 218-19. Reclamation's

reliance on the 2009 BO violates its ESA section 7 duties to avoid jeopardy and adverse modification.

III. THE ESA CITIZEN SUIT AND APA PROVIDE JURISDICTION TO REVIEW FWS'S RECOVERY GOALS

The ESA requires FWS to prepare recovery plans for endangered species. 16 U.S.C. § 1533(f)(1). Recovery plans must include "objective, measurable criteria" and time and cost estimates for implementing the actions necessary to achieve recovery. Id. § 1533(f)(1)(B)(i)-(iii). FWS must also provide public notice and comment and peer review. Id. § 1533(f)(4), (5); Paulsen, 413 F.3d at 1005; 59 Fed. Reg. at 34,270.

FWS's 2002 version of the Recovery Goals was vacated in 2006. Norton, 2006 WL 167560, at *5 (ordering 2002 Goals "withdraw[n]" and without "force and effect"). However, FWS implemented a slightly modified version of the vacated 2002 Goals in the 2009 BO. The Trust challenged the Goals for failure to comply with two ESA section 4 mandatory procedures: notice and comment including peer review, and time and cost estimates. The district court avoided ruling on these defects, finding it lacked jurisdiction to review the Trust's challenge. ER 117-20.

A. ESA Jurisdiction

The ESA's citizen suit provision provides jurisdiction over claims alleging violations of mandatory section 4(f) duties. 16 U.S.C. § 1540(g)(1)(C). The duty

to provide for notice and comment and time and cost estimates is mandatory. Id. § 1533(f)(1)(B), (4); see also ER 718 (ESA jurisdiction proper over challenge to lack of time and cost estimates); ER 1371-73 (Trust notice letter).

The district court stated that these mandatory duties are not yet applicable because the Goals "remain in draft form." ER 120. However, FWS's actions indicate otherwise. FWS implemented the Goals to support the 2009 BO's reliance on the LCR population and its recovery analysis, claiming the Goals contained the best available science, even without undertaking public and peer review. ER 1640. By using the Goals to prop up the 2009 BO, the agency declared them final and fit for use in important decision-making – whether Dam operations violate the ESA FWS cannot have it both ways: if the agency wants to use the Goals, FWS must also abide by the mandatory ESA requirements to ensure the Goals are appropriate for such use.

B. Alternatively, APA Jurisdiction Is Present

Even if the ESA citizen suit does not provide jurisdiction, the APA does. The APA authorizes challenges to "final agency action." 5 U.S.C. § 704. An "agency action" includes a "rule," defined as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." Id. § 551(4), (13). The Goals satisfy the test for an APA rule, as they implement the ESA and prescribe criteria

for FWS (and others) to assess chub recovery in the context of specific activities. Illustrating the Goals' status as a rule, FWS used them to support the 2009 BO.

"Final" agency action means: (1) "the action must mark the 'consummation' of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature;" and (2) "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" Bennett v. Spear, 520 U.S. 154, 177-78 (1997). "The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." Franklin v. Massachusetts, 505 U.S. 788, 798 (1992). The inquiry must be "interpreted in a pragmatic and flexible manner." Or. Natural Desert Ass'n v. U.S. Forest Serv. (ONDA), 465 F.3d 977, 982 (9th Cir. 2006).

The Goals meet both Bennett requirements. The July 12, 2009 version of the Goals concluded an administrative process. ER 1455-1572. FWS used the Goals in a concrete and binding way and, accordingly, they represent FWS's "last word" on the matter in question: what is necessary for chub recovery. See ONDA, 465 F.3d at 984. Further, the Goals have legal consequences, as they support the 2009 BO and thus MLFF operations. See id. at 985 ("It is the effect of the action and not its label that must be considered"); Nevada v. Herrington, 777 F.2d 529, 535 (9th Cir. 1985) (finding draft guideline had "hallmarks of finality" in ripeness

inquiry because agency relied on it to make funding decisions); ER 720 (District of Arizona noting "[o]nly when these recommendations [in the Goals] are relied upon to support some other action are they 'final' for purposes of the APA.").

In short, the district court's jurisdictional ruling should be reversed and the Goals remanded for a ruling on the merits.

IV. RECLAMATION IS VIOLATING THE ESA'S TAKE PROHIBITION

A. Dam Operations Unlawfully "Take" Humpback Chub

Taking endangered species is unlawful. 16 U.S.C. § 1538(a)(1)(B). In the 2010 ITS, FWS determined that MLFF takes chub. ER 1798 ("young-of-year and juvenile humpback chub are likely to be killed or harmed with implementation of the proposed dam operations"). According to FWS:

> Such take is likely to occur as a result of: cold shock caused by the cold water releases from Glen Canyon Dam on [the] mainstem and especially near-shore habitats occupied by the chub; stranding caused by the dewatering of these near-shore habitats due to daily flow fluctuations; and predation by nonnative fish population that are supported by the altered habitat conditions downstream of Glen Canyon Dam.

Id.

This take is unlawful for two reasons. First, as detailed below, the 2010 ITS violates the ESA, and thus does not exempt Reclamation from take liability. See 16 U.S.C. § 1536(o).

Second, the 2010 ITS does not cover all take caused by Dam operations. Specifically, FWS ignored the fact that Reclamation cancelled nonnative control in

March 2010 and Dam operations are thus killing approximately 10,000 young chub each year through predation. Because the 2010 ITS does not acknowledge, let alone permit, this taking, Reclamation's Dam operations are unlawful. See Dkt. 40-1 (appellate docket) (motion for injunction pending appeal to remedy this unauthorized take).

B. FWS's 2010 ITS Is Unlawful

In an ITS, FWS must "specif[y] the impact of [the] incidental taking on the species," preferably through a "numerical cap." 16 U.S.C. § 1536(b)(4)(i); Or. Natural Res. Council v. Allen, 476 F.3d 1031, 1037 (9th Cir. 2007). When this number, or "trigger," is reached, the action agency and FWS must reinitiate consultation. 50 C.F.R. § 402.16(a); Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1249 (9th Cir. 2001). If FWS "establish[es] that no such numerical value could be practically obtained," the agency may use a "surrogate" provided it is "linked to the take of the protected species." Allen, 476 F.3d at 1037; Ariz. Cattle, 273 F.3d at 1250. The surrogate "must be able to perform the functions of a numerical limitation" and must include a measurable limit that could trigger reconsultation. Allen, 476 F.3d at 1038. In addition to setting a take limit, an ITS must include "reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize" incidental take (i.e., "minimization measures"). 16 U.S.C. § 1536(b)(4)(ii); 50 C.F.R. § 402.14(i)(1)(ii).

1. FWS's Claim That Take Of Young Chub Cannot Be Quantified Is Unsupported

The 2010 ITS does not quantify take for young chub. According to FWS, the number of young chub that will be taken by Dam operations "cannot be determined" because:

> it will be difficult to (1) predict the extent of the young-of-year and juvenile populations that will be exposed to take-causing conditions or (2) detect the take due to the small size of the individuals likely to be affected, the large size and remoteness of the action area, and the fact that, in part, the take involves ingestion of chub by nonnative fish.

ER 1798.

FWS's assertion is contrary to the record evidence and the best available science. See State Farm, 463 U.S. at 43; PCFFA, 426 F.3d at 1090. FWS has, in fact, quantified take from Dam operations in two related and recent ITSs. In the November 2010 ITS, FWS and Reclamation estimated that nonnatives would kill 10,817 young chub over a 13-month period. ER 1861. This estimate is based on exactly the information FWS claims is unobtainable: the number of young chub likely ingested by nonnative fish. See ER 916-72. Similarly, in the 2008 ITS, FWS quantified take caused by the March 2008 BHBF. ER 1216 (estimating take of "20 humpback chub mortalities during the high flow test").

Moreover, record evidence contradicts FWS's assertions that the area is too remote or young chub are too small to be monitored or counted. The 2009 BO recites numerous studies collecting population information on young chub in the

Colorado River. ER 1652, 1657, 1671. Indeed, in the 2008 ITS, FWS estimated the number of young chub in the river:

> [a] reasonable, although very approximate, estimate of numbers of young-of-year and juvenile humpback chub that could be present during the high flow test, based on catch rates and hoop net catch data, is about 6,000.

ER 1202, 1215. As FWS stated in the 1978 BO, "[p]ast and present distribution of . . . chub is well documented between Lake Powell and Lake Mead, in spite of the difficulties involved with collecting in these remote areas." ER 168.[21]

The fact that FWS has quantified take caused by Dam operations on two different occasions and young chub are monitored regularly in the Colorado River undermines the agency's claim that take "cannot be determined." ER 1798. The Eleventh Circuit rejected an ITS for similar reasons in Miccosukee Tribe of Indians of Fla. v. United States, 566 F.3d 1257 (11th Cir. 2009). The Miccosukee Tribe court held that FWS's claim that the species was too "difficult to detect" was contradicted by the fact that "several Service-employed scientists spend a great deal of time actually counting these particular birds and creating yearly population data based on their efforts." Id. at 1275; see also Natural Res. Def. Council v. Evans, 279 F. Supp. 2d 1129, 1185 (N.D. Cal. 2003) (holding impracticability

[21] FWS must demonstrate the "impracticality" of doing surveys, not simply that they have not been done. See Allen, 476 F.3d at 1038; ER 987 ("A preliminary analysis of data collected by this program from 2002-2006 shows that the strategies implemented in 2003, 2004, and 2006 can effectively monitor the fish community of the Colorado River through Grand Canyon.").

claim lacked record support). In short, the ITS falls far short of "establishing" that a numerical cap could not be "practically obtained" as required by the ESA. See Allen, 476 F.3d at 1037.

2. FWS's Take Surrogate Is Not Adequately Linked To The Take Of Young Chub

After claiming take of young chub in the Colorado River cannot be quantified, FWS adopted a take surrogate of the LCR adult chub population. ER 1799, 1801. If that population drops below 6,000 chub and the decrease "is not attributable to other factors (such as [] parasites or diseases)," Dam operations will exceed the authorized take and the agencies must reconsult. ER 1799.

This surrogate is unlawful because it does not "perform the functions of a numerical limitation" and is not "linked to the take of the protected species." See Allen, 476 F.3d at 1038; Ariz. Cattle, 273 F.3d at 1250. Chub are not considered adults until they are four years old. ER 1172. As such, takings of chub spawned between 2010 and 2012 will not be reflected by the adult chub population until after the 5-year Experimental Plan ends in 2012 – the agency action covered by the ITS. See Allen, 476 F.3d at 1039 (rejecting ITS because level of take "cannot be reached until the project itself is complete"). This delay means the surrogate is not linked to the permitted taking and defeats the purpose of a take limit: to trigger reconsultation and modify the action. 40 C.F.R. § 402.14(i)(4); Allen, 476 F.3d at 1038.

Second, FWS's take surrogate includes qualifying language that renders it meaningless. The surrogate requires evidence that the adult population has dropped below 6,000 fish due to Dam operations and not other factors. ER 1799. However, FWS has determined that MLFF has little or no effect on the LCR. ER 1702-03. Indeed, the reason the chub's adult population in the LCR has increased since 2001 is unknown. ER 38 ("The reasons for these increases are not presently known . . . ."); ER 59 ("The exact causes of the increase in recruitment, and whether it is attributable to conditions in the mainstem or in the Little Colorado River are unclear."). If FWS is unable to determine the cause of a population increase, it similarly will be unable to assess the cause of a decrease. FWS does not explain how it will determine whether a decline is attributable to Dam operations or other causes. As a result, the take surrogate is not measurable. See Allen, 476 F.3d at 1038 (take surrogate must "contain measureable guidelines to determine when incidental take would be exceeded"); Wild Fish Conservancy, 628 F.3d at 532 (action agency must be able to "determine when the trigger has been met").

3. FWS Arbitrarily Failed To Include "Reasonable And Prudent Measures" In The 2010 ITS

In the 2010 ITS, FWS identifies monitoring take as the sole minimization measure. ER 1801; see also 16 U.S.C. § 1536(b)(4)(ii); 50 C.F.R.

§ 402.14(i)(1)(ii). However, as a matter of law, monitoring is not a minimization measure. Under ESA regulations, monitoring is a mandatory component of an ITS; it is separate from, and in addition to, the requirement to include minimization measures in an ITS. Compare 50 C.F.R. § 402.14(i)(3), with id. § 402.14(i)(1)(ii); see also NWF, 524 F.3d at 932 ("As a general rule applicable to both statutes and regulations, textual interpretations that give no significance to portions of the text are disfavored."). In short, monitoring does not satisfy FWS's mandate to include minimization measures in the ITS.

Further, FWS's explanation for not including "additional" minimization measures (besides monitoring) is contrary to the record. The 2010 ITS states that no minimization measures were "necessary" or "appropriate" because Reclamation's implementation of the conservation measures was sufficient. ER 1801; ER 1168-71 (describing conservation measures). The "most notabl[e]" (ER 1801) and only conservation measure that could reduce take in the Colorado River is the mechanical removal of nonnative fish, as none of the other measures address takings from MLFF. However, because this measure was cancelled prior to the issuance of the 2010 ITS, FWS's reasoning for not including reasonable and prudent minimization measures lacks record support. See State Farm, 463 U.S. at 43.

V. RECLAMATION'S AOPS MUST COMPLY WITH THE ESA

The Supreme Court ruled that ESA section 7(a)(2) "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." TVA v. Hill, 437 U.S. at 185. Courts have interpreted the section 7(a)(2) consultation duty, designed to ensure agency actions do not cause jeopardy to species or adversely modify their critical habitat, broadly. Houston, 146 F.3d at 1125.

ESA consultation is required for any "agency actions" that "may affect" a listed species or critical habitat. "Agency action" means "any action authorized, funded, or carried out" by a federal agency, including those causing "modifications to the land, water or air." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02; W. Watersheds Project v. Matejko, 468 F.3d 1099, 1107-08 (9th Cir. 2006) (requiring affirmative agency conduct).

Consultation is triggered whenever an agency can exercise some discretion over the action to benefit an endangered species. 50 C.F.R. § 402.03 (section 7 "appl[ies] to all actions in which there is discretionary Federal involvement or control"); see, e.g., Wash. Toxics Coal. v. EPA, 413 F.3d 1024, 1033 (9th Cir. 2005) (holding EPA's registration of pesticides involved ongoing agency discretion); Houston, 146 F.3d at 1125-26 (finding executing water contract renewals was discretionary action not bound by prior contracts' terms); Turtle

Island, 340 F.3d at 977 (issuing fishing permits involved discretionary actions). Conversely, consultation is not required where a statutory scheme dictates an outcome, Nat'l Ass'n of Home Builders v. Defenders of Wildlife (NAHB), 551 U.S. 644, 669 (2007), or where an agency's continuing discretionary control over a private action is circumscribed by prior action, Envtl. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1080 (9th Cir. 2001); Sierra Club v. Babbitt, 65 F.3d 1502, 1509 (9th Cir. 1995).

The second requirement is that the agency action "may affect" a listed species or critical habitat. 50 C.F.R. § 402.14(a). The may affect threshold is "relatively low." California v. U.S. Dep't of Agric., 575 F.3d 999, 1018 (9th Cir. 2009); 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (FWS explaining "[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character" on listed species qualifies). If a listed species or designated critical habitat may be present in the "action area," this criterion is satisfied. See 50 C.F.R. § 402.02 (defining "action area"); W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 496-97 (9th Cir. 2011).

Here, ESA consultation on AOPs is required: Reclamation exercises its discretion in establishing the Dam's monthly volumes, which may affect the chub

and its Colorado River critical habitat. The Court should reverse and require Reclamation to complete consultation before issuing future AOPs.[22]

A. AOPs Are Discretionary Decisions That Determine Monthly Volumes Released From The Dam

Both the GCPA and the 1968 Act require Reclamation to develop AOPs each year. GCPA §§ 1804(c)(1)(A), 1802(a) ("[t]he Secretary shall operate Glen Canyon Dam in accordance with the [operating] criteria and operating plans specified in section 1804"); 1968 Act, § 1552(b). However, neither statute dictates an AOP's content, leaving that to Reclamation's discretion. Cf. NAHB, 551 U.S. at 669 (finding consultation not applicable when result "required by statute") (emphasis in original); NWF, 524 F.3d at 929 (action is discretionary if it is neither "specifically mandated by Congress" nor "necessitated by the broad mandate"). Under this authority, Reclamation issues AOPs to govern Dam operations for each water year, from October 1st through September 30th. 70 Fed. Reg. 15,873, 15,874 (Mar. 29, 2005) (AOPs "detail specific reservoir operations for the next operating year").

In AOPs, Reclamation exercises its discretion to determine monthly and annual volumes released from the Dam. ER 1118 (detailing scheduled monthly releases for 2008); ER 644 ("[M]onthly and annual release volumes for Glen

[22] The Court has ESA citizen suit jurisdiction over the Trust's ESA challenge to AOPs. 16 U.S.C. § 1540(g)(1)(A), (2); see ER 799-802.

Canyon Dam . . . are established by the annual operating plan (AOP) at the beginning of the water year"); ER 178 (State of Colorado recognizing "annual and monthly operations . . . are determined in the AOP"). Annual volumes are based on snowpack and water flowing into Lake Powell, and the requirements in the 2007 Interim Guidelines, which were developed to ensure a minimum annual volume is released from the Dam, even during drought years. ER 844, 866; ER 1008.[23]

Once annual volumes are determined, Reclamation establishes monthly volumes. Monthly volumes are not pre-determined, nor are they the same every year. Compare ER 1329 with ER 1118; ER 411-13. Instead, Reclamation determines monthly volumes after considering numerous factors. ER 188. ("Monthly volumes of releases vary depending on the type of water year and the Annual Operating Plan."). In particular, an AOP's monthly volumes must be consistent with the GCPA and the "values for which Grand Canyon National Park and Glen Canyon National Recreation Area were established." GCPA §§ 1802(a), 1804(c)(1); 137 Cong. Rec. S829 (Jan. 14, 1991) (Senator McCain offering: "we have an obligation to assist these species in their fight for survival. If changes in

[23] The 2007 Interim Guidelines were developed due to several years of drought in the Colorado River Basin between 2000 and 2005. ER 849 (characterizing recent drought as the worst in "one hundred years of recorded history").

dam operations can promote their recovery, as suggested by the Glen Canyon studies, then we must do what we can to assist."). Further,

> [AOPs] shall reflect appropriate consideration of the uses of the reservoirs for all purposes, including flood control, river regulation, beneficial consumptive uses, power production, water quality control, recreation, enhancement of fish and wildlife, and other environmental factors.

70 Fed. Reg. at 15,874; ER 424 ("As the AOP is developed each year, consideration is given to all the factors listed in the Operating Criteria, which include environmental concerns."); ER 244 (monthly volumes evaluate "fish and wildlife needs"); ER 265 (identifying "the downstream environment of the Grand Canyon" as "key" to AOP decisions).

Moreover, prior to deciding an AOP's monthly volumes, the GCPA requires Reclamation to consult with certain interested parties "to assist the Secretary in exercising such discretion." GCPA § 1804(c)(3); S. Rep. No. 102-267 at 137; ER 866; ER 265-66. The consultation process is not an empty gesture. It ensures AOPs involve "greater analysis" and AOP "decisions [are] appropriately discussed and debated." ER 266. For the 2008 AOP, the consultation process involved multiple meetings between Reclamation and select parties, and the circulation of several drafts for review and comment. ER 1042-46, 1061. As Reclamation acknowledged, "determining monthly releases is sometimes a difficult matter." ER 265.

Reclamation's monthly volumes can benefit the chub and its Colorado River critical habitat. See Turtle Island, 340 F.3d at 977. Different monthly volumes result in different daily fluctuations. With a monthly volume of 800,000 acre-feet or above, variations of 8,000 cfs are allowed under the Operating Criteria and the River will rise and fall six feet or more each day. ER 558; ER 275; ER 840. In contrast, monthly volumes between 600,000 and 800,000 acre-feet allow daily fluctuations of 6,000 cfs, and monthly volumes below 600,000 acre-feet reduce daily fluctuations further to 5,000 cfs. 62 Fed. Reg. at 9,448; ER 188. Because higher fluctuating flows cause more erosion of shoreline habitats and colder water temperatures, high monthly volumes destroy more chub habitat than when volumes are lower. See ER 766 (USGS identifying monthly volumes as "the greatest factor preventing accumulation of new sand inputs from tributaries over multi-year time scales").[24]

AOPs should not be confused with other Reclamation decisions regarding Dam operations. The Operating Criteria, as required by the GCPA and modified

[24] An AOP's monthly volumes have an additional effect on the chub's habitat: the sheer volume of water released each month and the pattern of monthly releases (equalize volumes all year or varied by season) affect downstream erosion. ER 1401 ("Export and erosion rates are strongly dependent on water release volume and daily release patterns."); ER 1303; ER 570; ER 1205; ER 766.

by the 2008 Experimental Plan, adopted MLFF. 62 Fed. Reg. 9,447. Through MLFF, Reclamation established a range of permissible hourly and daily releases that result in fluctuating flows. ER 386 (AOP noting "[d]aily and hourly releases will continue to be made according to the parameters of . . . the Glen Canyon Dam Operating Criteria"). MLFF, however, does not establish monthly volumes. Reclamation explained:

> Coordinated operations under the 2007 record of decision [for Interim Guidelines] govern the annual release from Lake Powell, while the 1996 record of decision governs releases from Lake Powell at shorter time increments, primarily daily and hourly releases.

ER 1223. Reclamation acknowledged that the 2008 Experimental Plan did not set "monthly release volumes," which "would continue to be projected for different hydrologic conditions prior to the beginning of the water year and described in annual operating plans." ER 1057; see also ER 1117.

Because AOPs make significant decisions regarding Dam operations, procedures are in place to change them during the water year. See ER 1100. Reclamation must first "undertake a mid-year review." ER 898. A one-time revision is permitted based on the "April 1 final forecast" and other factors. Id.; ER 1320 ("Modification[] to monthly operation plans may be based on other factors in addition to changes in stream flow forecasts."). The one-time revision must be completed by June and include the GCPA consultation process. ER 1100; 62 Fed. Reg. at 9,448 ("Any changes to the plan would require reconsultation in

accordance with th[e GCPA].”). To the extent there is a change, additional ESA compliance may be necessary. See 50 C.F.R. § 402.16(c) (requiring reconsultation if action “subsequently modified”); Sierra Club v. Marsh, 816 F.2d 1376, 1388 (9th Cir. 1987). The district court’s claim that monthly volumes in AOPs are regularly changed was simply wrong. See ER 22.

In sum, AOPs are agency actions under ESA section 7(a)(2).

B. AOPs May Affect The Chub And Its Critical Habitat

AOPs also satisfy the ESA’s “may affect” requirement. As the 2008 AOP notes,

> [t]he regulation of the Colorado River has had effects on aquatic and riparian resources. Controlled releases from dams have modified temperature, sediment load, and flow patterns . . . [which] have detrimental effects on endangered and other native species.

ER 1109. Reclamation’s 2008 AOP regulated Dam operations, selecting monthly volumes that varied from 555,000 acre-feet in April and May to a high of 820,000 acre-feet in August. ER 1118. As described above, these monthly volumes determine the extent of fluctuating flows and thus may affect the chub by destroying shoreline habitats, preventing river temperatures from warming, and providing an environment for predatory nonnative fish. This was especially true in 2008, when the monthly volumes selected resulted in the destruction of the shoreline habitat that had been created by the March 2008 BHBF experiment. ER 1204 (detailing MLFF’s impacts on BHBF-created habitats).

Accordingly, AOPs "may affect" the chub and its critical habitat.

VI. RECLAMATION MUST COMPLY WITH NEPA FOR AOPS

NEPA review is similarly required for AOPs because they are "major Federal actions" that "may result in significant environmental impacts." 42 U.S.C.§ 4332(C). NEPA compliance ensures Reclamation evaluates and publicly discloses the AOPs' impacts on all downstream natural, cultural, and recreational resources in Grand Canyon National Park.

A. AOPs Are Final Agency Actions Under The APA

This Court has APA jurisdiction over this claim because AOPs are "final agency actions." See 5 U.S.C. § 704. Pursuant to APA definitions, AOPs are a "rule" and thus an "agency action." See id. § 551(4), (13). AOPs implement the GCPA and 1968 Act by dictating the Dam's specific monthly and annual volume releases each year.

AOPs also satisfy the two-part Bennett v. Spear test for "final" agency action. 520 U.S. at 177-78. AOPs end a decision-making process, where, as described above, Reclamation exercises its discretion based on various considerations, consults with selected entities, and determines the amount of water to be released each year. AOPs also have legal and practical consequences in governing Dam operations. See ONDA, 465 F.3d at 987 (finding annual operating instructions final agency action because they set grazing rules for forthcoming

year). AOPs determine the fate of downstream resources, including the chub and its critical habitat. Further, power and water contracts are executed based on AOPs, providing clear and definite consequences for those involved. ER 644 (recognizing AOP is "single most important determinant of hydropower production and economic value"); ER 1243 (AOPs "to be developed in consultation with 'contractors for the purchase of Federal power produced at Glen Canyon Dam'"); ER 1270 ("AOP is a prerequisite to each year's placement of water orders by Colorado River water users in the Lower Basin."); ER 1294 ("The timely completion and issuance of the AOP is critical to water planning by Lower Basin water users. . . ."); ER 268-69.

Because AOPs constitute Reclamation's definitive statement on the Dam's monthly volumes, they are final agency actions, and APA jurisdiction is present.

B. AOPs Are Major Federal Actions

NEPA regulations define "major Federal action" to mean any "new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." 40 C.F.R. § 1508.18(a). Examples of major federal actions include "formal plans" and "[a]pproval of specific projects." Id. § 1508.18(b)(2), (4).

AOPs satisfy this requirement for NEPA applicability. For many of the same reasons it is a final agency action under the APA and an agency action under

the ESA, AOPs are also a NEPA major federal action. AOPs are "formal plans" mandated by the GCPA and the 1968 Act, wherein Reclamation determines annual Dam operations and sets monthly volume releases. AOPs are distinct from other Reclamation decisions governing Dam operations, as no other Reclamation decision sets monthly volumes each year.

In concluding NEPA does not apply, the district court mistakenly relied on Upper Snake River Chapter of Trout Unlimited v. Hodel, 921 F.2d 232 (9th Cir. 1990). ER 26. Upper Snake does not apply here. There, the court reviewed whether Reclamation's reduction in river flows was a major federal action, or part of a decision made previously. Upper Snake, 921 F.2d at 234-35. The court concluded that the decision to reduce flows did not warrant NEPA compliance because that decision was consistent with status quo operations; it did "nothing new, nor more extensive, other than that contemplated when the project was first operational." Id. at 235. Here, there is no status quo regarding monthly volumes because no prior Reclamation decision determined what they must be in 2008 or any other year. The Operating Criteria established daily and hourly flows and the Interim Guidelines required a minimum annual volume; neither, however, set monthly volumes.

Accordingly, because Reclamation makes unique determinations regarding Dam operations, AOPs are "major Federal actions" requiring NEPA compliance.

C. AOPs May Significantly Affect Grand Canyon Resources

AOPs easily surpass the threshold for significant impacts. A party "need not show that significant effects will in fact occur, but raising 'substantial questions whether a project may have a significant effect' is sufficient." Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 864-65 (9th Cir. 2004) (emphasis in original). NEPA regulations identify several factors to assess "significance." 40 C.F.R. § 1508.27(b).

As detailed above, the amount of water released on a monthly basis will adversely impact the humpback chub and its critical habitat. See 40 C.F.R. § 1508.27(b)(9). Relatedly, the failure to comply with other laws, such as the ESA, is a significant impact. See id. § 1508.27(b)(10). Moreover, AOPs are likely to destroy Grand Canyon National Park's world-class natural, cultural, archaeological, and recreational resources, which include all downstream riparian vegetation, wildlife, and recreational areas. See id. § 1508.27(b)(3), (8); ER 553, 616-22, 636, 653-54 (USGS describing impacts from Dam operations to riparian habitat and species, and recreational uses).

In sum, because AOPs are major federal actions that may significantly affect the environment, Reclamation must complete a NEPA analysis.

CONCLUSION

For the foregoing reasons, the Trust requests that the Court vacate FWS's 2009 BO and 2010 ITS, and remand the Goals for a decision on the merits. The Court also should find Reclamation's Dam operations violate the ESA, and enjoin such violations. Finally, the Court should require Reclamation to comply with the ESA and NEPA prior to issuing AOPs.

Respectfully submitted October 18, 2011,

/s/ McCrystie Adams
McCrystie Adams
Earthjustice

Neil Levine
Grand Canyon Trust

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 2011, I filed a true and exact copy of the APPELLANT'S OPENING BRIEF with the Court's CM/ECF system, which will generate a Notice of Filing and Service on the following:

Kathy Robb Hunton & Williams 200 Park Ave., 52nd Floor New York, NY 10166 krobb@hunton.com	Srinath Jay Govindan US Dept. of Justice P.O. Box 7369 Washington, DC 20044-7369 Jay.Govindan@usdoj.gov
Thomas K. Snodgrass US Dept. of Justice 1961 Stout Street 8th Floor Denver, CO 80294 Thomas.snodgrass@usdoj.gov	Nicole Deanne Klobas Kenneth C. Slowinski Arizona Dept. of Water Resources 3550 N. Central Ave., 2nd Floor Phoenix, AZ 85012-2105 ndswindle@azwater.gov kcslowinski@azwater.gov
Jennifer T. Crandell Office of the Attorney General State of Nevada 555 E. Washington Ave. Suite 3100 Las Vegas, NV 89101 jcrandell@ag.nv.gov	Karen Marie Kwon Peter J. Ampe Colorado Office of the Attorney General 1525 Sherman Street, 7th Floor Denver, CO 80203 Karen.kwon@state.co.us Peter.amoe@state.co.us
Amy Haas New Mexico Interstate Stream Commission P.O. Box 25102 Santa Fe, NM 87504-5102 Amy.haas@state.nm.us	Norman K. Johnson Michael Quealy State of Utah Office of the Attorney Natural Resources Division 1594 W N Temple, Suite 300 Salt Lake City, UT 84116 normanjohnson@utah.gov michaelquealy@utah.gov

Peter K. Michael Jeremiah Williamson Wyoming Attorney General's Office 123 Capitol Building Cheyenne, WY 82001 pmicha@state.wy.us jwilli@state.wy.us	Stephen R. Farris Attorney General of New Mexico P.O. Drawer 1508 Santa Fe, NM 87504-1508 sfarris@nmag.gov
Michael Hughes Office of the Attorney General Dept. of Justice 300 S. Spring St., Suite 1702 Los Angeles, CA 90013 Michael.Hughes@doj.ca.gov	Bennett W. Raley Trout Raley Montano Witwer & Freeman PC 1120 Lincoln St., Suite 1600 Denver, CO 80203 braley@troutlaw.com
Peter E. VonHaam The Metropolitan Water District of Southern California P.O. Box 54153 Los Angeles, CA 90054-0153 pvonhaam@mwdh2o.com	John Pendleton Carter, III Horton Knox Carter & Foote 1221 W. State St. El Centro, CA 92243 jcarter@hkcf-law.com
Dana Walsh Southern Nevada Water Authority 1001 S. Valley View Blvd Las Vegas, NV 89153 Dana.walsh@snwa.com	David C. Shilton Appellate Section, ENRD U.S. Department of Justice P.O. Box 23795 Washington, D.C. 20036

Suzanne Ticknor 23636 North 7th Street Phoenix, AZ 85024	Gary Tavetian Office of the California Attorney General Suite 1702 300 South Spring Street Los Angeles, CA 90013 Gary.Tavetian@doj.ca.gov
Judith Ann Moore Office of Attorney General State of New Mexico Suite 300 111 Lomas NW Albuquerque, NM 98102 amoore@nmag.gov	

/s/ McCrystie Adams

ADDENDUM INDEX

Statutes

5 U.S.C. § 551 1

5 U.S.C. §§ 701-706 4

16 U.S.C. § 1532 11

16 U.S.C. § 1533 14

16 U.S.C. § 1536 23

16 U.S.C. § 1538 32

16 U.S.C. § 1540 36

42 U.S.C. § 4321 41

42 U.S.C. § 4332 42

43 U.S.C. § 620 44

43 U.S.C. § 1501 45

43 U.S.C. § 1552 46

Pub. L. No. 102-575, §§ 1801-1809, 106 Stat. 4600 (1992) 48

Federal Regulations

40 C.F.R. Part 1501 52

40 C.F.R. Part 1502 56

40 C.F.R. Part 1508 64

50 C.F.R. § 17.3 70

50 C.F.R. Part 402 (excerpts).....73

Legislative History

House Report No. 101-641(1990) (excerpts) 81

House Report No. 102-114 Part 1 (1991) (excerpts).....87

Senate Report No. 102-267 (1992) (excerpts).....100

137 Cong. Rec. S829 (Jan. 14, 1991) (excerpts) 110

138 Cong. Rec. S17831 (Oct. 8, 1992).....112

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 5. Administrative Procedure (Refs & Annos)
Subchapter II. Administrative Procedure (Refs & Annos)

5 U.S.C.A. § 551

§ 551. Definitions

Effective: January 4, 2011

Currentness

For the purpose of this subchapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title--

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency--

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency--

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

Credits

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 381; Pub.L. 94-409, § 4(b), Sept. 13, 1976, 90 Stat. 1247; Pub.L. 103-272, § 5(a), July 5, 1994, 108 Stat. 1373; Pub.L. 111-350, § 5(a)(2), Jan. 4, 2011, 124 Stat. 3841.)

Notes of Decisions (236)

Current through P.L. 112-28 approved 8-12-11

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 701

§ 701. Application; definitions

Effective: January 4, 2011

Currentness

(a) This chapter applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or

sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

Credits

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 103-272, § 5(a), July 5, 1994, 108 Stat. 1373; Pub.L. 111-350, § 5(a)(3), Jan. 4, 2011, 124 Stat. 3841.)

Notes of Decisions (767)

Current through P.L. 112-28 approved 8-12-11

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 702

§ 702. Right of review

Currentness

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Credits

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

Notes of Decisions (1060)

Current through P.L. 112-28 approved 8-12-11

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 703

§ 703. Form and venue of proceeding

Currentness

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

Credits

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

Notes of Decisions (79)

Current through P.L. 112-28 approved 8-12-11

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 704

§ 704. Actions reviewable

Currentness

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Credits

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

Notes of Decisions (797)

Current through P.L. 112-28 approved 8-12-11

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 705

§ 705. Relief pending review

Currentness

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

Credits

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Notes of Decisions (49)

Current through P.L. 112-28 approved 8-12-11

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 706

§ 706. Scope of review

Currentness

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Credits

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Notes of Decisions (2910)

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1532

§ 1532. Definitions

Currentness

For the purposes of this chapter--

(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 chapter 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 1533 of this title, 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 1533 of this title, 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 chapter 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. Pub.L. 97-304, § 4(b), Oct. 13, 1982, 96 Stat. 1420.

(12) The term "permit or license applicant" means, when used with respect to an action of a Federal agency for which exemption is sought under section 1536 of this title, any person whose application to such agency for a permit or license has been denied primarily because of the application of section 1536(a) of this title 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 chapter 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.

Credits

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

Notes of Decisions (52)

Current through P.L. 112-28 approved 8-12-11

End of Document

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1533

§ 1533. Determination of endangered species and threatened species

Effective: November 24, 2003

Currentness

(a) Generally

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

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

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

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

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

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

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

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

(ii) be changed in status from a threatened species to an endangered species,

he shall so inform the Secretary of the Interior, who shall list such species in accordance with this section;

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

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

(ii) be changed in status from an endangered species to a threatened species,

he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

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

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) of this section 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 670a of this title, 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 1536(a)(2) of this title 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 1538 of this title, 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) of this section 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) of this section 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, to add a species to, or to remove a species from, either of the lists published under subsection (c) of this section, 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) of this section and to remove from such lists species for which the protections of this chapter 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[1] 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, 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 (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this chapter.

(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) of this section, 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 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 chapter 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) of this section.

(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) of this section.

(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 1538(a) (1) of this title, in the case of fish or wildlife, or section 1538(a) (2) of this title, 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 1535(c) of this title 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 this section if he finds that--

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

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

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

(f) Recovery plans

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

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

(B) incorporate in each plan--

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

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

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

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

(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 chapter 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) of this section.

(2) The Secretary shall make prompt use of the authority under paragraph 7[1] of subsection (b) of this section to prevent a significant risk to the well being of any such recovered species.

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

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

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

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

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

(4) a system for developing and implementing, on a priority basis, recovery plans under subsection (f) of this section.

The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.

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

If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) of this section 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) of this section, 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.

Credits

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

Notes of Decisions (227)

Current through P.L. 112-28 approved 8-12-11

Footnotes

1 So in original. Probably should be “paragraph (7)”.

End of Document

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1536

§ 1536. Interagency cooperation

Currentness

(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 chapter. 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 chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(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 1533 of this title 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) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a) (2) of this section 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) of this section 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) of this section, 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) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

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

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

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

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

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

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 1371(a)(5) of this title 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) of this section, 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 November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(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) of this section, 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) of this section.

(e) Endangered Species Committee

(1) 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 pursuant to subsection (g) (2) (B) of this section 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.

(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 [5 U.S.C.A. § 552a], 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 subpenas 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) Promulgation of regulations; form and contents of exemption application

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to--

(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; report to 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) of this section, the Secretary's opinion under subsection (b) of this section indicates that the agency action would violate subsection (a) (2) of this section. 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) of this section 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) of this section, 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) of this section 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) of this section;

(ii) conducted any biological assessment required by subsection (c) of this section; 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) of this section; 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.

(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 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) of this section.

(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.

(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) Grant of 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) of this section. The Committee shall grant an exemption from the requirements of subsection (a) (2) of this section 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) of this section 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) of this section; 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.

(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) of this section 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) of this section or was not identified in any biological assessment conducted under subsection (c) of this section, 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; violation of international treaty or other international obligation of United States

Notwithstanding any other provision of this chapter, 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) Exemption for national security reasons

Notwithstanding any other provision of this chapter, 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) Exemption decision not considered major Federal action; environmental impact statement

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 [42 U.S.C.A. § 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 order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality

(1) If the Committee determines under subsection (h) of this section 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) of this section 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 requirement for citizen suits not applicable

The 60-day notice requirement of section 1540(g) of this title 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 1532(13) of this title, may obtain judicial review, under chapter 7 of Title 5, of any decision of the Endangered Species Committee under subsection (h) of this section 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. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section--

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

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

(p) Exemptions in Presidentially declared disaster areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. § 5121 et seq.], the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. §§ 5171 or 5172], and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

Credits

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

Notes of Decisions (459)

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1538

§ 1538. Prohibited acts

Currentness

(a) Generally

(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--

(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 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(2) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of plants listed pursuant to section 1533 of this title, 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 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(b) Species held in captivity or controlled environment

(1) 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 1533 of this title: *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 1533 of this title, 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) of this section shall not apply to--

(i) any raptor legally held in captivity or in a controlled environment on November 10, 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 1533 of this title 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 chapter or any regulation issued pursuant to this chapter.

(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 1533 of this title 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 1533 of this title 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 chapter 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 1533 of this title 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 chapter 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 668cc-4(d) of this title, shall, if such designation is in effect on December 27, 1973, be deemed to be a port designated by the Secretary under paragraph (1) of this subsection until such time as the Secretary otherwise provides.

(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.

Credits

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

Notes of Decisions (127)

Current through P.L. 112-28 approved 8-12-11

End of Document

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1540

§ 1540. Penalties and enforcement

Effective: May 13, 2002

Currentness

(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 chapter, 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 1538 of this title, 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 chapter 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 chapter, 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. The Secretary may issue subpenas 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 subpena 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 chapter, 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 chapter, 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 1538 of this title 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 chapter 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 chapter 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 chapter 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 chapter, 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, shall have jurisdiction over any actions arising under this chapter. For the purpose of this chapter, 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 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 chapter or any regulation issued hereunder (1) a reward to any person who furnishes information which leads to an arrest, a criminal conviction, civil penalty assessment, or forfeiture of property for any violation of this chapter or any regulation issued hereunder, and (2) the reasonable and necessary costs incurred by any person in providing temporary care for any fish, wildlife, or plant pending the disposition of any civil or criminal proceeding alleging a violation of this chapter with respect to that fish, wildlife, or plant. The amount of the reward, if any, is to be designated by the Secretary or the Secretary of the Treasury, as appropriate. Any officer or employee of the United States or any State or local government who furnishes information or renders service in the performance of his official duties is ineligible for payment under this subsection. Whenever the balance of sums received under this section and section 3375(d) of this title, 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 1535(i) of this title.

(e) Enforcement

(1) The provisions of this chapter 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 chapter.

(2) The judges of the district courts of the United States and the United States magistrate judges 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 chapter 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 chapter 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 chapter 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 chapter. 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 consignee to post a bond or other surety satisfactory to the Secretary, but upon forfeiture of any such property to the United States, or the abandonment or waiver of any claim to any such property, it shall be disposed of (other than by sale to the general public) by the Secretary in such a manner, consistent with the purposes of this chapter, 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 chapter, 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 chapter, 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 subsection (b)(1) of this section.

(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 chapter, insofar as such provisions of law are applicable and not inconsistent with the provisions of this chapter; 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 chapter, 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 chapter 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 chapter, and charge reasonable fees for expenses to the Government connected with permits or certificates authorized by this chapter 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 chapter. 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 chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title 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 1533 of this title 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 1535(g)(2)(B)(ii) of this title 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 chapter with the administration of the animal quarantine laws (as defined in section 136a(f) of Title 21) and section 306 of the Tariff Act of 1930 (19 U.S.C. 1306). Nothing in this chapter 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 chapter 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 chapter 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 [19 U.S.C.A. § 1202 et seq.], 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.

Credits

(Pub.L. 93-205, § 11, Dec. 28, 1973, 87 Stat. 897; Pub.L. 94-359, § 4, July 12, 1976, 90 Stat. 913; Pub.L. 95-632, §§ 6 to 8, Nov. 10, 1978, 92 Stat. 3761, 3762; Pub.L. 97-79, § 9(e), Nov. 16, 1981, 95 Stat. 1079; Pub.L. 97-304, §§ 7, 9(c), Oct. 13, 1982, 96 Stat. 1425, 1427; Pub.L. 98-327, § 4, June 25, 1984, 98 Stat. 271; Pub.L. 100-478, Title I, § 1007, Oct. 7, 1988, 102 Stat. 2309; Pub.L. 101-650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117; Pub.L. 107-171, Title X, § 10418(b)(3), May 13, 2002, 116 Stat. 508.)

Notes of Decisions (361)

Current through P.L. 112-28 approved 8-12-11

End of Document

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 55. National Environmental Policy (Refs & Annos)

42 U.S.C.A. § 4321

§ 4321. Congressional declaration of purpose

Currentness

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Credits

(Pub.L. 91-190, § 2, Jan. 1, 1970, 83 Stat. 852.)

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 55. National Environmental Policy (Refs & Annos)
Subchapter I. Policies and Goals (Refs & Annos)

42 U.S.C.A. § 4332

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

Currentness

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

Credits

(Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub.L. 94-83, Aug. 9, 1975, 89 Stat. 424.)

United States Code Annotated
Title 43. Public Lands (Refs & Annos)
Chapter 12B. Colorado River Storage Project (Refs & Annos)

43 U.S.C.A. § 620

§ 620. Upper Colorado River Basin; purpose of development of water resources; initial units; construction of Wayne N. Aspinall unit contingent upon certification; participating projects; Rainbow Bridge National Monument

Effective: March 30, 2009

Currentness

In order to initiate the comprehensive development of the water resources of the Upper Colorado River Basin, for the purposes, among others, of regulating the flow of the Colorado River, storing water for beneficial consumptive use, making it possible for the States of the Upper Basin to utilize, consistently with the provisions of the Colorado River Compact, the apportionments made to and among them in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, providing for the reclamation of arid and semiarid land, for the control of floods, and for the generation of hydroelectric power, as an incident of the foregoing purposes, the Secretary of the Interior is authorized (1) to construct, operate, and maintain the following initial units of the Colorado River storage project, consisting of dams, reservoirs, powerplants, transmission facilities and appurtenant works: Wayne N. Aspinall, Flaming Gorge, Navajo (dam and reservoir only), and Glen Canyon: *Provided*, That the Wayne N. Aspinall Dam shall be constructed to a height which will impound not less than nine hundred and forty thousand acre-feet of water or will create a reservoir of such greater capacity as can be obtained by a high waterline located at seven thousand five hundred and twenty feet above mean sea level, and that construction thereof shall not be undertaken until the Secretary has, on the basis of further engineering and economic investigations, reexamined the economic justification of such unit and, accompanied by appropriate documentation in the form of a supplemental report, has certified to the Congress and to the President that, in his judgment, the benefits of such unit will exceed its costs; and (2) to construct, operate, and maintain the following additional reclamation projects (including power-generating and transmission facilities related thereto), hereinafter referred to as participating projects: Central Utah (initial phase and the Uintah unit), San Juan-Chama (initial stage), Emery County, Florida, Hammond, La Barge, Lyman, Navajo Indian, Paonia (including the Minnesota unit, a dam and reservoir on Muddy Creek just above its confluence with the North Fork of the Gunnison River, and other necessary works), Animas-La Plata, Dolores, Dallas Creek, West Divide, San Miguel, Seedskadee, Savery-Pot Hook, Bostwick Park, Fruitland Mesa, the Navajo-Gallup Water Supply Project, Silt and Smith Fork: *Provided further*, That as part of the Glen Canyon Unit the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument.

Credits

(Apr. 11, 1956, c. 203, § 1, 70 Stat. 105; June 13, 1962, Pub.L. 87-483, § 18, 76 Stat. 102; Sept. 2, 1964, Pub.L. 88-568, § 1, 78 Stat. 852; Sept. 30, 1968, Pub.L. 90-537, Title V, § 501(a), 82 Stat. 896; Oct. 3, 1980, Pub.L. 96-375, § 7, 94 Stat. 1507; Oct. 19, 1980, Pub.L. 96-470, Title I, § 108(c), 94 Stat. 2239; Mar. 30, 2009, Pub.L. 111-11, Title X, § 10401(a), 123 Stat. 1371.)

United States Code Annotated
Title 43. Public Lands (Refs & Annos)
Chapter 32. Colorado River Basin Project (Refs & Annos)
Subchapter I. Objectives

43 U.S.C.A. § 1501

§ 1501. Congressional declaration of purpose and policy

Currentness

(a) It is the object of this chapter to provide a program for the further comprehensive development of the water resources of the Colorado River Basin and for the provision of additional and adequate water supplies for use in the upper as well as in the lower Colorado River Basin. This program is declared to be for the purposes, among others, of regulating the flow of the Colorado River; controlling floods; improving navigation; providing for the storage and delivery of the waters of the Colorado River for reclamation of lands, including supplemental water supplies, and for municipal, industrial, and other beneficial purposes; improving water quality; providing for basic public outdoor recreation facilities; improving conditions for fish and wildlife, and the generation and sale of electrical power as an incident of the foregoing purposes.

(b) It is the policy of the Congress that the Secretary of the Interior (hereinafter referred to the "Secretary") shall continue to develop, after consultation with affected States and appropriate Federal agencies, a regional water plan, consistent with the provisions of this chapter and with future authorizations, to serve as the framework under which projects in the Colorado River Basin may be coordinated and constructed with proper timing to the end that an adequate supply of water may be made available for such projects, whether heretofore, herein, or hereafter authorized.

Credits

(Pub.L. 90-537, Title I, § 102, Sept. 30, 1968, 82 Stat. 886.)

Current through P.L. 112-28 approved 8-12-11

End of Document

United States Code Annotated
Title 43. Public Lands (Refs & Annos)
Chapter 32. Colorado River Basin Project (Refs & Annos)
Subchapter V. General Provisions

43 U.S.C.A. § 1552

§ 1552. Criteria for long-range operation of reservoirs

Currentness

(a) Promulgation by Secretary; order of priorities

In order to comply with and carry out the provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, and the Mexican Water Treaty, the Secretary shall propose criteria for the coordinated long-range operation of the reservoirs constructed and operated under the authority of the Colorado River Storage Project Act [43 U.S.C.A. § 620 et seq.], the Boulder Canyon Project Act [43 U.S.C.A. § 617 et seq.], and the Boulder Canyon Project Adjustment Act [43 U.S.C.A. § 618 et seq.]. To effect in part the purposes expressed in this paragraph, the criteria shall make provision for the storage of water in storage units of the Colorado River storage project and releases of water from Lake Powell in the following listed order of priority:

(1) releases to supply one-half the deficiency described in article III(c) of the Colorado River Compact, if any such deficiency exists and is chargeable to the States of the Upper Division, but in any event such releases, if any, shall not be required in any year that the Secretary makes the determination and issues the proclamation specified in section 1512 of this title;

(2) releases to comply with article III(d) of the Colorado River Compact, less such quantities of water delivered into the Colorado River below Lee Ferry to the credit of the States of the Upper Division from other sources; and

(3) storage of water not required for the releases specified in clauses (1) and (2) of this subsection to the extent that the Secretary, after consultation with the Upper Colorado River Commission and representatives of the three Lower Division States and taking into consideration all relevant factors (including, but not limited to, historic stream-flows, the most critical period of record, and probabilities of water supply), shall find this to be reasonably necessary to assure deliveries under clauses (1) and (2) without impairment of annual consumptive uses in the upper basin pursuant to the Colorado River Compact: *Provided*, That water not so required to be stored shall be released from Lake Powell: (i) to the extent it can be reasonably applied in the States of the Lower Division to the uses specified in article III(e) of the Colorado River Compact, but no such releases shall be made when the active storage in Lake Powell is less than the active storage in Lake Mead, (ii) to maintain, as nearly as practicable, active storage in Lake Mead equal to the active storage in Lake Powell, and (iii) to avoid anticipated spills from Lake Powell.

(b) Submittal of criteria for review and comment; publication; report to Congress

Not later than January 1, 1970, the criteria proposed in accordance with the foregoing subsection (a) of this section shall be submitted to the Governors of the seven Colorado River Basin States and to such other parties and agencies as the Secretary may deem appropriate for their review and comment. After receipt of comments on the proposed criteria, but not later than July 1, 1970, the Secretary shall adopt appropriate criteria in accordance with this section and publish the same in the Federal Register. Beginning January 1, 1972, and yearly thereafter, the Secretary shall transmit to the Congress and to the Governors of the Colorado River Basin States a report describing the actual operation under the adopted criteria for the preceding

compact water year and the projected operation for the current year. As a result of actual operating experience or unforeseen circumstances, the Secretary may thereafter modify the criteria to better achieve the purposes specified in subsection (a) of this section, but only after correspondence with the Governors of the seven Colorado River Basin States and appropriate consultation with such State representatives as each Governor may designate.

(c) Powerplant operations

Section 7 of the Colorado River Storage Project Act [43 U.S.C.A. § 620f] shall be administered in accordance with the foregoing criteria.

Credits

(Pub.L. 90-537, Title VI, § 602, Sept. 30, 1968, 82 Stat. 900.)

Notes of Decisions (1)

Current through P.L. 112-28 approved 8-12-11

End of Document

PL 102–575, October 30, 1992, 106 Stat 4600

UNITED STATES PUBLIC LAWS
102nd Congress - Second Session
Convening January 3, 1992
3236

Additions and Deletions are not identified in this document.
8848

PL 102–575 (HR 429)
October 30, 1992
RECLAMATION PROJECTS AUTHORIZATION AND ADJUSTMENT ACT OF 1992

TITLE XVIII—GRAND CANYON PROTECTION

SEC. 1801. SHORT TITLE.

This Act may be cited as the “Grand Canyon Protection Act of 1992”.

SEC. 1802. PROTECTION OF GRAND CANYON NATIONAL PARK.

(a) IN GENERAL.—The Secretary shall operate Glen Canyon Dam in accordance with the additional criteria and operating plans specified in section 1804 and exercise other authorities under existing law in such a manner as to project, mitigate adverse impacts to, and improve the values for which Grand Canyon National Park and Glen Canyon National Recreation Area were established, including, but not limited to natural and cultural resources and visitor use.
(b) COMPLIANCE WITH EXISTING LAW.—The Secretary shall implement this section in a manner fully consistent with and subject to the Colorado River Compact, the Upper Colorado River Basin Compact, the Water Treaty of 1944 with Mexico, the decree of the Supreme Court in Arizona v. California, and the provisions of the Colorado River Storage Project Act of 1956 and the Colorado River Basin Project Act of 1968 that govern allocation, appropriation, development, and exportation of the waters of the Colorado River Basin.
(c) RULE OF CONSTRUCTION.—Nothing in this title alters the purposes for which the Grand Canyon National Park or the Glen Canyon National Recreation Area were established or affects the PUBNUM=0006793STAT.4670authority and responsibility of the Secretary with respect to the management and administration of the Grand Canyon National Park and Glen Canyon National Recreation Area, including natural and cultural resources and visitor use, under laws applicable to those areas, including, but not limited to, the Act of August 25, 1916 (39 Stat. 535) as amended and supplemented.

SEC. 1803. INTERIM PROTECTION OF GRAND CANYON NATIONAL PARK.

(a) INTERIM OPERATIONS.—Pending compliance by the Secretary with section 1804, the Secretary shall, on an interim basis, continue to operate Glen Canyon Dam under the Secretary's announced interim operating criteria and the Interagency Agreement between the Bureau of Reclamation and the Western Area Power Administration executed October 2, 1991 and exercise other authorities under existing law, in accordance with the standards set forth in section 1802, utilizing the best and most recent scientific data available.
(b) CONSULTATION.—The Secretary shall continue to implement Interim Operations in consultation with—

(1) Appropriate agencies of the Department of the Interior, including the Bureau of Reclamation, United States Fish and Wildlife Service, and the National Park Service;
(2) The Secretary of Energy;
(3) The Governors of the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming;
(4) Indian Tribes; and
(5) The general public, including representatives of the academic and scientific communities, environmental organizations, the recreation industry, and contractors for the purchase of Federal power produced at Glen Canyon Dam.
(c) DEVIATION FROM INTERIM OPERATIONS.—The Secretary may deviate from Interim Operations upon a finding that deviation is necessary and in the public interest to—
(1) comply with the requirements of Section 1804(a);
(2) respond to hydrologic extremes or power system operation emergencies;
(3) comply with the standards set forth in Section 1802;
(4) respond to advances in scientific data; or
(5) comply with the terms of the Interagency Agreement.
(d) TERMINATION OF INTERIM OPERATIONS.—Interim operations described in this section shall terminate upon compliance by the Secretary with section 1804.

SEC. 1804. GLEN CANYON DAM ENVIRONMENTAL IMPACT STATEMENT; LONG–TERM OPERATION OF GLEN CANYON DAM.

(a) FINAL ENVIRONMENTAL IMPACT STATEMENT.—Not later than 2 years after the date of enactment of this Act, the Secretary shall complete a final Glen Canyon Dam environmental impact statement, in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).
(b) AUDIT.—The Comptroller General shall—
(1) audit the costs and benefits to water and power users and to natural, recreational, and cultural resources resulting from management policies and dam operations identified pursuant to the environmental impact statement described in subsection (a); and
(2) report the results of the audit to the Secretary and the Congress.
PUBNUM=0006793STAT.4671(c) ADOPTION OF CRITERIA AND PLANS.—(1) Based on the findings, conclusions, and recommendations made in the environmental impact statement prepared pursuant to subsection (a) and the audit performed pursuant to subsection (b), the Secretary shall—
(A) adopt criteria and operating plans separate from and in addition to those specified in section 602(b) of the Colorado River Basin Project Act of 1968; and
(B) exercise other authorities under existing law, so as to ensure that Glen Canyon Dam is operated in a manner consistent with section 1802.
(2) Each year after the date of the adoption of criteria and operating plans pursuant to paragraph (1), the Secretary shall transmit to the Congress and to the Governors of the Colorado River Basin States a report, separate from and in addition to the report specified in section 602(b) of the Colorado River Basin Project Act of 1968 on the preceding year and the projected year operations undertaken pursuant to this Act.
(3) In preparing the criteria and operating plans described in section 602(b) of the Colorado River Basin Project Act of 1968 and in this subsection, the Secretary shall consult with the Governors of the Colorado River Basin States and with the general public, including—
(A) representatives of academic and scientific communities;
(B) environmental organizations;
(C) the recreation industry; and
(D) contractors for the purchase of Federal power produced at Glen Canyon Dam.
(d) REPORT TO CONGRESS.—Upon implementation of long-term operations under subsection (c), the Secretary shall submit to the Congress the environmental impact statement described in subsection (a) and a report describing the long-term operations and other reasonable mitigation measures taken to protect, mitigate adverse impacts to, and improve the condition of the natural, recreational, and cultural resources of the Colorado River downstream of Glen Canyon Dam.
(e) ALLOCATION OF COSTS.—The Secretary of the Interior, in consultation with the Secretary of Energy, is directed to

reallocate the costs of construction, operation, maintenance, replacement and emergency expenditures for Glen Canyon Dam among the purposes directed in section 1802 of this Act and the purposes established in the Colorado River Storage Project Act of April 11, 1956 (70 Stat. 170). Costs allocated to section 1802 purposes shall be nonreimbursable. Except that in fiscal year 1993 through 1997 such costs shall be nonreimbursable only to the extent to which the Secretary finds the effect of all provisions of this Act is to increase net offsetting receipts; Provided, That if the Secretary finds in any such year that the enactment of this Act does cause a reduction in net offsetting receipts generated by all provisions of this Act, the costs allocated to section 1802 purposes shall remain reimbursable. The Secretary shall determine the effect of all the provisions of this Act and submit a report to the appropriate House and Senate committees by January 31 of each fiscal year, and such report shall contain for that fiscal year a detailed accounting of expenditures incurred pursuant to this Act, offsetting receipts generated by this Act, and any increase or reduction in net offsetting receipts generated by this Act.

PUBNUM=0006793STAT.4672
SEC. 1805. LONG–TERM MONITORING.

(a) IN GENERAL.—The Secretary shall establish and implement long-term monitoring programs and activities that will ensure that Glen Canyon Dam is operated in a manner consistent with that of section 1802.
(b) RESEARCH.—Long-term monitoring of Glen Canyon Dam shall include any necessary research and studies to determine the effect of the Secretary's actions under section 1804(c) on the natural, recreational, and cultural resources of Grand Canyon National Park and Glen Canyon National Recreation Area.
(c) CONSULTATION.—The monitoring programs and activities conducted under subsection (a) shall be established and implemented in consultation with—
(1) the Secretary of Energy;
(2) the Governors of the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming;
(3) Indian tribes; and
(4) the general public, including representatives of academic and scientific communities, environmental organizations, the recreation industry, and contractors for the purchase of Federal power produced at Glen Canyon Dam.

SEC. 1806. RULES OF CONSTRUCTION.

Nothing in this title is intended to affect in any way—
(1) the allocations of water secured to the Colorado Basin States by any compact, law, or decree; or
(2) any Federal environmental law, including the Endangered Species Act (16 U.S.C. 1531 et seq.).

SEC. 1807. STUDIES NONREIMBURSABLE.

All costs of preparing the environmental impact statement described in section 1804, including supporting studies, and the long-term monitoring programs and activities described in section 1805 shall be nonreimbursable. The Secretary is authorized to use funds received from the sale of electric power and energy from the Colorado River Storage Project to prepare the environmental impact statement described in section 1804, including supporting studies, and the long-term monitoring programs and activities described in section 1805, except that such funds will be treated as having been repaid and returned to the general fund of the Treasury as costs assigned to power for repayment under section 5 of the Act of April 11, 1956 (70 Stat. 170). Except that in fiscal year 1993 through 1997 such provisions shall take effect only to the extent to which the Secretary finds the effect of all the provisions of this Act is to increase net offsetting receipts; Provided, That if the Secretary finds in any such year that the enactment of this Act does cause a reduction in net offsetting receipts generated by all provisions of this Act, all costs described in this section shall remain reimbursable. The Secretary shall determine the effect of all the provisions of this Act and submit a report to the appropriate House and Senate committees by January 31 of each fiscal year, and such report shall contain for that fiscal year a detailed accounting of expenditures incurred pursuant to this Act, offsetting receipts generated by this Act, and any increase or reduction in net offsetting receipts generated by this Act.

PUBNUM=0006793STAT.4673

SEC. 1808. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as are necessary to carry out this title.

SEC. 1809. REPLACEMENT POWER.

The Secretary of Energy in consultation with the Secretary of the Interior and with representatives of the Colorado River Storage Project power customers, environmental organizations and the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall identify economically and technically feasible methods of replacing any power generation that is lost through adoption of long-term operational criteria for Glen Canyon Dam as required by section 1804 of this title. The Secretary shall present a report of the findings, and implementing draft legislation, if necessary, not later than two years after adoption of long-term operating criteria. The Secretary shall include an investigation of the feasibility of adjusting operations at Hoover Dam to replace all or part of such lost generation. The Secretary shall include an investigation of the modifications or additions to the transmission system that may be required to acquire and deliver replacement power.

(a) Integrating the NEPA process into early planning (§ 1501.2).
(b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§ 1501.6).
(c) Insuring the swift and fair resolution of lead agency disputes (§ 1501.5).
(d) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.7).
(e) Establishing appropriate time limits for the environmental impact statement process (§§ 1501.7(b)(2) and 1501.8).
(f) Preparing environmental impact statements early in the process (§ 1502.5).
(g) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).
(h) Eliminating duplication with State and local procedures by providing for joint preparation (§ 1506.2) and with other Federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).
(i) Combining environmental documents with other documents (§ 1506.4).
(j) Using accelerated procedures for proposals for legislation (§ 1506.8).
(k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§ 1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.
(l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase ''to the fullest extent possible'' in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

PART 1501—NEPA AND AGENCY PLANNING

Sec.
1501.1 Purpose.
1501.2 Apply NEPA early in the process.
1501.3 When to prepare an environmental assessment.
1501.4 Whether to prepare an environmental impact statement.
1501.5 Lead agencies.
1501.6 Cooperating agencies.
1501.7 Scoping.
1501.8 Time limits.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

§ 1501.1 Purpose.

The purposes of this part include:
(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.
(b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.
(c) Providing for the swift and fair resolution of lead agency disputes.
(d) Identifying at an early stage the significant environmental issues deserving of study and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement accordingly.
(e) Providing a mechanism for putting appropriate time limits on the environmental impact statement process.

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to ''utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment,'' as specified by §1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in §1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in §1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by §1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in §1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under §1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

§ 1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§ 1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

[43 FR 55992, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in §1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b)(3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

§1501.7 Scoping.

There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (§1508.22) in the FEDERAL REGISTER except as provided in §1507.3(e).

(a) As part of the scoping process the lead agency shall:

(1) Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds), unless there is a limited exception under §1507.3(c). An agency may give notice in accordance with §1506.6.

(2) Determine the scope (§1508.25) and the significant issues to be analyzed in depth in the environmental impact statement.

(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(4) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(5) Indicate any public environmental assessments and other environmental impact statements which are being or will be prepared that are related to but are not part of the scope of the impact statement under consideration.

(6) Identify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in §1502.25.

(7) Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.

(b) As part of the scoping process the lead agency may:

(1) Set page limits on environmental documents (§1502.7).

(2) Set time limits (§1501.8).

(3) Adopt procedures under §1507.3 to combine its environmental assessment process with its scoping process.

(4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(c) An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed

action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

§ 1501.8 Time limits.

Although the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible, Federal agencies are encouraged to set time limits appropriate to individual actions (consistent with the time intervals required by § 1506.10). When multiple agencies are involved the reference to agency below means lead agency.

(a) The agency shall set time limits if an applicant for the proposed action requests them: *Provided*, That the limits are consistent with the purposes of NEPA and other essential considerations of national policy.

(b) The agency may:

(1) Consider the following factors in determining time limits:

(i) Potential for environmental harm.

(ii) Size of the proposed action.

(iii) State of the art of analytic techniques.

(iv) Degree of public need for the proposed action, including the consequences of delay.

(v) Number of persons and agencies affected.

(vi) Degree to which relevant information is known and if not known the time required for obtaining it.

(vii) Degree to which the action is controversial.

(viii) Other time limits imposed on the agency by law, regulations, or executive order.

(2) Set overall time limits or limits for each constituent part of the NEPA process, which may include:

(i) Decision on whether to prepare an environmental impact statement (if not already decided).

(ii) Determination of the scope of the environmental impact statement.

(iii) Preparation of the draft environmental impact statement.

(iv) Review of any comments on the draft environmental impact statement from the public and agencies.

(v) Preparation of the final environmental impact statement.

(vi) Review of any comments on the final environmental impact statement.

(vii) Decision on the action based in part on the environmental impact statement.

(3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(c) State or local agencies or members of the public may request a Federal Agency to set time limits.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Sec.

1502.1 Purpose.
1502.2 Implementation.
1502.3 Statutory requirements for statements.
1502.4 Major Federal actions requiring the preparation of environmental impact statements.
1502.5 Timing.
1502.6 Interdisciplinary preparation.
1502.7 Page limits.
1502.8 Writing.
1502.9 Draft, final, and supplemental statements.
1502.10 Recommended format.
1502.11 Cover sheet.
1502.12 Summary.
1502.13 Purpose and need.
1502.14 Alternatives including the proposed action.
1502.15 Affected environment.
1502.16 Environmental consequences.
1502.17 List of preparers.
1502.18 Appendix.
1502.19 Circulation of the environmental impact statement.
1502.20 Tiering.
1502.21 Incorporation by reference.
1502.22 Incomplete or unavailable information.
1502.23 Cost-benefit analysis.
1502.24 Methodology and scientific accuracy.
1502.25 Environmental review and consultation requirements.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

§ 1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the

Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

§ 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§ 1502.3 Statutory requirements for statements.

As required by sec. 102(2)(C) of NEPA environmental impact statements (§ 1508.11) are to be included in every recommendation or report.

On proposals (§ 1508.23).

For legislation and (§ 1508.17).

Other major Federal actions (§ 1508.18).

Significantly (§ 1508.27).

Affecting (§§ 1508.3, 1508.8).

The quality of the human environment (§ 1508.14).

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such

as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

§ 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.7).

§ 1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

§ 1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements

in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

§ 1502.10 Recommended format.

Agencies shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action. The following standard format for environmental impact statements should be followed unless the agency determines that there is a compelling reason to do otherwise:

(a) Cover sheet.

(b) Summary.

(c) Table of contents.

(d) Purpose of and need for action.

(e) Alternatives including proposed action (sections 102(2)(C)(iii) and 102(2)(E) of the Act).

(f) Affected environment.

(g) Environmental consequences (especially sections 102(2)(C)(i), (ii), (iv), and (v) of the Act).

(h) List of preparers.

(i) List of Agencies, Organizations, and persons to whom copies of the statement are sent.

(j) Index.

(k) Appendices (if any).

If a different format is used, it shall include paragraphs (a), (b), (c), (h), (i), and (j), of this section and shall include the substance of paragraphs (d), (e), (f), (g), and (k) of this section, as further described in §§ 1502.11 through 1502.18, in any appropriate format.

§ 1502.11 Cover sheet.

The cover sheet shall not exceed one page. It shall include:

(a) A list of the responsible agencies including the lead agency and any cooperating agencies.

(b) The title of the proposed action that is the subject of the statement (and if appropriate the titles of related cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction if applicable) where the action is located.

(c) The name, address, and telephone number of the person at the agency who can supply further information.

(d) A designation of the statement as a draft, final, or draft or final supplement.

(e) A one paragraph abstract of the statement.

(f) The date by which comments must be received (computed in cooperation with EPA under § 1506.10).

The information required by this section may be entered on Standard Form 424 (in items 4, 6, 7, 10, and 18).

§ 1502.12 Summary.

Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice

among alternatives). The summary will normally not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1502.17 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§ 1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§ 1502.18 Appendix.

If an agency prepares an appendix to an environmental impact statement the appendix shall:

(a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§ 1502.21)).

(b) Normally consist of material which substantiates any analysis fundamental to the impact statement.

(c) Normally be analytic and relevant to the decision to be made.

(d) Be circulated with the environmental impact statement or be readily available on request.

§ 1502.19 Circulation of the environmental impact statement.

Agencies shall circulate the entire draft and final environmental impact statements except for certain appendices as provided in § 1502.18(d) and unchanged statements as provided in § 1503.4(c). However, if the statement is unusually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

(a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft.

If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.

§ 1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

§ 1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material

may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, ''reasonably foreseeable'' includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1986]

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

§ 1502.25 Environmental review and consultation requirements.

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), and other environmental review laws and executive orders.

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other entitlement is necessary, the draft environmental impact statement shall so indicate.

PART 1503—COMMENTING

Sec.

1503.1 Inviting comments.
1503.2 Duty to comment.
1503.3 Specificity of comments.
1503.4 Response to comments.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55997, Nov. 29, 1978, unless otherwise noted.

§ 1503.1 Inviting comments.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate State and local agencies which are authorized to develop and enforce environmental standards;

(ii) Indian tribes, when the effects may be on a reservation; and

(iii) Any agency which has requested that it receive statements on actions of the kind proposed.

Office of Management and Budget Circular A–95 (Revised), through its system of clearinghouses, provides a means of securing the views of State and local environmental agencies. The clearinghouses may be used, by mutual agreement of the lead agency and the clearinghouse, for securing State and local reviews of the draft environmental impact statements.

(3) Request comments from the applicant, if any.

(4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.

(b) An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under § 1506.10.

§ 1503.2 Duty to comment.

Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority. Agencies shall comment within the time period specified for comment in § 1506.10. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should reply that it has no comment.

§ 1503.3 Specificity of comments.

(a) Comments on an environmental impact statement or on a proposed action shall be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both.

(b) When a commenting agency criticizes a lead agency's predictive methodology, the commenting agency should describe the alternative methodology which it prefers and why.

which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

(d) Agency procedures may provide for periods of time other than those presented in §1506.10 when necessary to comply with other specific statutory requirements.

(e) Agency procedures may provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent required by §1501.7 may be published at a reasonable time in advance of preparation of the draft statement.

PART 1508—TERMINOLOGY AND INDEX

Sec.

1508.1 Terminology.
1508.2 Act.
1508.3 Affecting.
1508.4 Categorical exclusion.
1508.5 Cooperating agency.
1508.6 Council.
1508.7 Cumulative impact.
1508.8 Effects.
1508.9 Environmental assessment.
1508.10 Environmental document.
1508.11 Environmental impact statement.
1508.12 Federal agency.
1508.13 Finding of no significant impact.
1508.14 Human environment.
1508.15 Jurisdiction by law.
1508.16 Lead agency.
1508.17 Legislation.
1508.18 Major Federal action.
1508.19 Matter.
1508.20 Mitigation.
1508.21 NEPA process.
1508.22 Notice of intent.
1508.23 Proposal.
1508.24 Referring agency.
1508.25 Scope.
1508.26 Special expertise.
1508.27 Significantly.
1508.28 Tiering.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

§ 1508.1 Terminology.

The terminology of this part shall be uniform throughout the Federal Government.

§ 1508.2 Act.

Act means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*) which is also referred to as ''NEPA.''

§ 1508.3 Affecting.

Affecting means will or may have an effect on.

§ 1508.4 Categorical exclusion.

Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in §1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

§ 1508.5 Cooperating agency.

Cooperating agency means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in §1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

§ 1508.6 Council.

Council means the Council on Environmental Quality established by title II of the Act.

§ 1508.7 Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

Environmental document includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not

repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of ''effects'' (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction by law.

Jurisdiction by law means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

Lead agency means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

Legislation includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.;* treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.19 Matter.

Matter includes for purposes of part 1504:

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

Mitigation includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§ 1508.21 NEPA process.

NEPA process means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.

§ 1508.22 Notice of intent.

Notice of intent means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

Referring agency means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental

consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

§ 1508.26 Special expertise.

Special expertise means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1508.28 Tiering.

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement

subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

Index to Parts 1500 Through 1508

EDITORIAL NOTE: This listing is provided for information purposes only. It is compiled and kept up-to-date by the Council on Environmental Quality, and is revised through July 1, 2009.

INDEX

Act	1508.2.
Action	1508.18, 1508.25.
Action-forcing	1500.1, 1502.1.
Adoption	1500.4(n), 1500.5(h), 1506.3.
Affected Environment	1502.10(f), 1502.15.
Affecting	1502.3, 1508.3.
Agency Authority	1500.6.
Agency Capability	1501.2(a), 1507.2.
Agency Compliance	1507.1.
Agency Procedures	1505.1, 1507.3.
Agency Responsibility	1506.5.
Alternatives	1501.2(c), 1502.2, 1502.10(e), 1502.14, 1505.1(e), 1505.2, 1507.2(d), 1508.25(b).
Appendices	1502.10(k), 1502.18, 1502.24.
Applicant	1501.2(d)(1), 1501.4(b), 1501.8(a), 1502.19(b), 1503.1(a)(3), 1504.3(e), 1506.1(d), 1506.5(a), 1506.5(b).
Apply NEPA Early in the Process.	1501.2.
Categorical Exclusion	1500.4(p), 1500.5(k), 1501.4(a), 1507.3(b), 1508.4.
Circulating of Environmental Impact Statement.	1502.19, 1506.3.
Classified Information	1507.3(c).
Clean Air Act	1504.1, 1508.19(a).
Combining Documents	1500.4(o), 1500.5(i), 1506.4.
Commenting	1502.19, 1503.1, 1503.2, 1503.3, 1503.4, 1506.6(f).
Consultation Requirement	1500.4(k), 1500.5(g), 1501.7(a)(6), 1502.25.
Context	1508.27(a).
Cooperating Agency	1500.5(b), 1501.1(b), 1501.5(c), 1501.5(f), 1501.6, 1503.1(a)(1), 1503.2, 1503.3, 1506.3(c), 1506.5(a), 1508.5.
Cost-Benefit	1502.23.
Council on Environmental Quality.	1500.3, 1501.5(e), 1501.5(f), 1501.6(c), 1502.9(c)(4), 1504.1, 1504.2, 1504.3, 1506.6(f), 1506.9, 1506.10(e), 1506.11, 1507.3, 1508.6, 1508.24.
Cover Sheet	1502.10(a), 1502.11.
Cumulative Impact	1508.7, 1508.25(a), 1508.25(c).
Decisionmaking	1505.1, 1506.1.
Decision points	1505.1(b).
Dependent	1508.25(a).
Draft Environmental Impact Statement.	1502.9(a).
Early Application of NEPA	1501.2.
Economic Effects	1508.8.
Effective Date	1506.12.
Effects	1502.16, 1508.8.
Emergencies	1506.11.
Endangered Species Act	1502.25, 1508.27(b)(9).
Energy	1502.16(e).
Environmental Assessment	1501.3, 1501.4(b), 1501.4(c), 1501.7(b)(3), 1506.2(b)(4), 1506.5(b), 1508.4, 1508.9, 1508.10, 1508.13.
Environmental Consequences	1502.10(g), 1502.16.
Environmental Consultation Requirements.	1500.4(k), 1500.5(g), 1501.7(a)(6), 1502.25, 1503.3(c).
Environmental Documents	1508.10.
Environmental Impact Statement.	1500.4, 1501.4(c), 1501.7, 1501.3, 1502.1, 1502.2, 1502.3, 1502.4, 1502.5, 1502.6, 1502.7, 1502.8, 1502.9, 1502.10, 1502.11, 1502.12, 1502.13, 1502.14, 1502.15, 1502.16, 1502.17, 1502.18, 1502.19, 1502.20, 1502.21, 1502.22, 1502.23, 1502.24, 1502.25, 1506.2(b)(4), 1506.3, 1506.8, 1508.11.
Environmental Protection Agency.	1502.11(f), 1504.1, 1504.3, 1506.7(c), 1506.9, 1506.10, 1508.19(a).
Environmental Review Requirements.	1500.4(k), 1500.5(g), 1501.7(a)(6), 1502.25 1503.3(c).
Expediter	1501.8(b)(2).
Federal Agency	1508.12.
Filing	1506.9.
Final Environmental Impact Statement.	1502.9(b), 1503.1, 1503.4(b).
Finding of No Significant Impact.	1500.3, 1500.4(q), 1500.5(1), 1501.4(e), 1508.13.
Fish and Wildlife Coordination Act.	1502.25.
Format for Environmental Impact Statement.	1502.10.
Freedom of Information Act	1506.6(f).
Further Guidance	1506.7.
Generic	1502.4(c)(2).
General Services Administration.	1506.8(b)(5).
Geographic	1502.4(c)(1).
Graphics	1502.8.
Handbook	1506.7(a).

6) which are deemed endangered species under section 4(c)(3) of the Act.

[40 FR 44415, Sept. 26, 1975, as amended at 42 FR 10465, Feb. 22, 1977]

§ 17.2 Scope of regulations.

(a) The regulations of this part apply only to endangered and threatened wildlife and plants.

(b) By agreement between the Service and the National Marine Fisheries Service, the jurisdiction of the Department of Commerce has been specifically defined to include certain species, while jurisdiction is shared in regard to certain other species. Such species are footnoted in subpart B of this part, and reference is given to special rules of the National Marine Fisheries Service for those species.

(c) The provisions in this part are in addition to, and are not in lieu of, other regulations of this subchapter B which may require a permit or prescribe additional restrictions or conditions for the importation, exportation, and interstate transportation of wildlife.

(d) The examples used in this part are provided solely for the convenience of the public, and to explain the intent and meaning of the regulation to which they refer. They have no legal significance.

(e) Certain of the wildlife and plants listed in §§17.11 and 17.12 as endangered or threatened are included in Appendix I, II or III to the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The importation, exportation and reexportation of such species are subject to additional regulations provided in part 23 of this subchapter.

[40 FR 44415, Sept. 26, 1975, as amended at 42 FR 10465, Feb. 22, 1977]

§ 17.3 Definitions.

In addition to the definitions contained in part 10 of this subchapter, and unless the context otherwise requires, in this part 17:

Act means the Endangered Species Act of 1973 (16 U.S.C. 1531–1543; 87 Stat. 884);

Adequately covered means, with respect to species listed pursuant to section 4 of the ESA, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA for the species covered by the plan, and, with respect to unlisted species, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA that would otherwise apply if the unlisted species covered by the plan were actually listed. For the Services to cover a species under a conservation plan, it must be listed on the section 10(a)(1)(B) permit.

Alaskan Native means a person defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1603(b) (85 Stat. 588)) as a citizen of the United States who is of one-fourth degree or more Alaska Indian (including Tsimshian Indians enrolled or not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or combination thereof. The term includes any Native, as so defined, either or both of whose adoptive parents are not Natives. It also includes, in the absence of proof of a minimum blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or town of which he claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any Native village or Native town. Any citizen enrolled by the Secretary pursuant to section 5 of the Alaska Native Claims Settlement Act shall be conclusively presumed to be an Alaskan Native for purposes of this part;

Authentic native articles of handicrafts and clothing means items made by an Indian, Aleut, or Eskimo that are composed wholly or in some significant respect of natural materials and are significantly altered from their natural form and are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or similar mass-copying devices. Improved methods of production utilizing modern implements such as sewing machines or modern techniques at a tannery registered pursuant to §18.23(c) of this subchapter (in the case of marine mammals) may be used as long as no large-scale mass production industry results. Traditional native handicrafts

include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting. The formation of traditional native groups, such as cooperatives, is permitted as long as no large-scale mass production results;

Bred in captivity or *captive-bred* refers to wildlife, including eggs, born or otherwise produced in captivity from parents that mated or otherwise transferred gametes in captivity, if reproduction is sexual, or from parents that were in captivity when development of the progeny began, if development is asexual.

Captivity means that living wildlife is held in a controlled environment that is intensively manipulated by man for the purpose of producing wildlife of the selected species, and that has boundaries designed to prevent animal, eggs or gametes of the selected species from entering or leaving the controlled environment. General characteristics of captivity may include but are not limited to artificial housing, waste removal, health care, protection from predators, and artificially supplied food.

Changed circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan or agreement that can reasonably be anticipated by plan or agreement developers and the Service and that can be planned for (e.g., the listing of new species, or a fire or other natural catastrophic event in areas prone to such events).

Conservation plan means the plan required by section 10(a)(2)(A) of the ESA that an applicant must submit when applying for an incidental take permit. Conservation plans also are known as ''habitat conservation plans'' or ''HCPs.''

Conserved habitat areas means areas explicitly designated for habitat restoration, acquisition, protection, or other conservation purposes under a conservation plan.

Convention means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, TIAS 8249.

Enhance the propagation or survival, when used in reference to wildlife in captivity, includes but is not limited to the following activities when it can be shown that such activities would not be detrimental to the survival of wild or captive populations of the affected species:

(a) Provision of health care, management of populations by culling, contraception, euthanasia, grouping or handling of wildlife to control survivorship and reproduction, and similar normal practices of animal husbandry needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible;

(b) Accumulation and holding of living wildlife that is not immediately needed or suitable for propagative or scientific purposes, and the transfer of such wildlife between persons in order to relieve crowding or other problems hindering the propagation or survival of the captive population at the location from which the wildlife would be removed; and

(c) Exhibition of living wildlife in a manner designed to educate the public about the ecological role and conservation needs of the affected species.

Endangered means a species of wildlife listed in §17.11 or a species of plant listed in §17.12 and designated as endangered.

Harass in the definition of ''take'' in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. This definition, when applied to captive wildlife, does not include generally accepted:

(1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act,

(2) Breeding procedures, or

(3) Provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.

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.

Incidental taking means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

Industry or trade in the definition of ''commercial activity'' in the Act means the actual or intended transfer of wildlife or plants from one person to another person in the pursuit of gain or profit;

Native village or town means any community, association, tribe, clan or group;

Operating conservation program means those conservation management activities which are expressly agreed upon and described in a conservation plan or its Implementing Agreement, if any, and which are to be undertaken for the affected species when implementing an approved conservation plan, including measures to respond to changed circumstances.

Population means a group of fish or wildlife in the same taxon below the subspecific level, in common spatial arrangement that interbreed when mature;

Properly implemented conservation plan means any conservation plan, Implementing Agreement and permit whose commitments and provisions have been or are being fully implemented by the permittee.

Property owner with respect to agreements outlined under §§17.22(c), 17.22(d), 17.32(c), and 17.32(d) means a person with a fee simple, leasehold, or other property interest (including owners of water or other natural resources), or any other entity that may have a property interest, sufficient to carry out the proposed management activities, subject to applicable State law, on non-Federal land.

Specimen means any animal or plant, or any part, product, egg, seed or root of any animal or plant;

Subsistence means the use of endangered or threatened wildlife for food, clothing, shelter, heating, transportation and other uses necessary to maintain the life of the taker of the wildlife, or those who depend upon the taker to provide them with such subsistence, and includes selling any edible portions of such wildlife in native villages and towns in Alaska for native consumption within native villages and towns;

Threatened means a species of wildlife listed in §17.11 or plant listed in §17.12 and designated as threatened.

Unforeseen circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan or agreement that could not reasonably have been anticipated by plan or agreement developers and the Service at the time of the conservation plan's or agreement's negotiation and development, and that result in a substantial and adverse change in the status of the covered species.

Wasteful manner means any taking or method of taking which is likely to result in the killing or injury of endangered or threatened wildlife beyond those needed for subsistence purposes, or which results in the waste of a substantial portion of the wildlife, and includes without limitation the employment of a method of taking which is not likely to assure the capture or killing of the wildlife, or which is not immediately followed by a reasonable effort to retrieve the wildlife.

[40 FR 44415, Sept. 26, 1975, as amended at 42 FR 28056, June 1, 1977; 44 FR 54006, Sept. 17, 1979; 46 FR 54750, Nov. 4, 1981; 47 FR 31387, July 20, 1982; 50 FR 39687, Sept. 30, 1985; 63 FR 8870, Feb. 23, 1998; 63 FR 48639, Sept. 11, 1998; 69 FR 24092, May 3, 2004; 71 FR 46870, Aug. 15, 2006]

§17.4 Pre-Act wildlife.

(a) The prohibitions defined in subparts C and D of this part 17 shall not apply to any activity involving endangered or threatened wildlife which was held in captivity or in a controlled environment on December 28, 1973: *Provided*,

(1) That the purposes of such holding were not contrary to the purposes of the Act; and

(2) That the wildlife was not held in the course of a commercial activity.

Example 1. On January 25, 1974, a tourist buys a stuffed hawksbill turtle (an endangered species listed since June, 1970), in a foreign country. On December 28, 1973, the stuffed turtle had been on display for sale.

any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species or results in the destruction or adverse modification of critical habitat. Section 7(a)(3) of the Act authorizes a prospective permit or license applicant to request the issuing Federal agency to enter into early consultation with the Service on a proposed action to determine whether such action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Section 7(a)(4) of the Act requires Federal agencies to confer with the Secretary on any action that is likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat. Section 7(b) of the Act requires the Secretary, after the conclusion of early or formal consultation, to issue a written statement setting forth the Secretary's opinion detailing how the agency action affects listed species or critical habitat Biological assessments are required under section 7(c) of the Act if listed species or critical habitat may be present in the area affected by any major construction activity as defined in § 404.02. Section 7(d) of the Act prohibits Federal agencies and applicants from making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would avoid jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. Section 7(e)–(o)(1) of the Act provide procedures for granting exemptions from the requirements of section 7(a)(2). Regulations governing the submission of exemption applications are found at 50 CFR part 451, and regulations governing the exemption process are found at 50 CFR parts 450, 452, and 453.

(b) The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) share responsibilities for administering the Act. The Lists of Endangered and Threatened Wildlife and Plants are found in 50 CFR 17.11 and 17.12 and the designated critical habitats are found in 50 CFR 17.95 and 17.96 and 50 CFR part 226. Endangered or threatened species under the jurisdiction of the NMFS are located in 50 CFR 222.23(a) and 227.4. If the subject species is cited in 50 CFR 222.23(a) or 227.4, the Federal agency shall contact the NMFS. For all other listed species the Federal Agency shall contact the FWS.

§ 402.02 Definitions.

Act means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq*.

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

(a) actions intended to conserve listed species or their habitat;

(b) the promulgation of regulations;

(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or

(d) actions directly or indirectly causing modifications to the land, water, or air.

Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

Applicant refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.

Biological assessment refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat.

Biological opinion is the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Conference is a process which involves informal discussions between a Federal agency and the Service under section

7(a)(4) of the Act regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.

Conservation recommendations are suggestions of the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information.

Critical habitat refers to an area designated as critical habitat listed in 50 CFR parts 17 or 226.

Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.

Designated non-Federal representative refers to a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment.

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

Director refers to the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration, or his authorized representative; or the Fish and Wildlife Service regional director, or his authorized representative, for the region where the action would be carried out.

Early consultation is a process requested by a Federal agency on behalf of a prospective applicant under section 7(a)(3) of the Act.

Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

Formal consultation is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act.

Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant.

Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required.

Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

Listed species means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11–17.12.

Major construction activity is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. 4332(2)(C)].

Preliminary biological opinion refers to an opinion issued as a result of early consultation.

Proposed critical habitat means habitat proposed in the FEDERAL REGISTER to be designated or revised as critical habitat under section 4 of the Act for any listed or proposed species.

Proposed species means any species of fish, wildlife, or plant that is proposed in the FEDERAL REGISTER to be listed under section 4 of the Act.

Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Reasonable and prudent measures refer to those actions the Director believes necessary or appropriate to minimize the impacts, *i.e.*, amount or extent, of incidental take.

Recovery means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.

Service means the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.

§ 402.03 Applicability.

Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.

§ 402.04 Counterpart regulations.

The consultation procedures set forth in this part may be superseded for a particular Federal agency by joint counterpart regulations among that agency, the Fish and Wildlife Service, and the National Marine Fisheries Service. Such counterpart regulations shall be published in the FEDERAL REGISTER in proposed form and shall be subject to public comment for at least 60 days before final rules are published.

§ 402.05 Emergencies.

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

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

§ 402.06 Coordination with other environmental reviews.

(a) Consultation, conference, and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required by other statutes, such as the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*, implemented at 40 CFR Parts 1500–1508) or the Fish and Wildlife Coordination Act (FWCA) (16 U.S.C. 661 *et seq.*). Satisfying the requirements of these other statutes, however, does not in itself relieve a Federal agency of its obligations to comply with the procedures set forth in this part or the substantive requirements of section 7. The Service will attempt to provide a coordinated review and analysis of all environmental requirements.

(b) Where the consultation or conference has been consolidated with the interagency cooperation procedures required by other statutes such as NEPA or FWCA, the results should be included in the documents required by those statutes.

the biological assessment requirement for the proposed action by incorporating by reference the earlier biological assessment, plus any supporting data from other documents that are pertinent to the consultation, into a written certification that:

(1) The proposed action involves similar impacts to the same species in the same geographic area;

(2) No new species have been listed or proposed or no new critical habitat designated or proposed for the action area; and

(3) The biological assessment has been supplemented with any relevant changes in information.

(h) *Permit requirements.* If conducting a biological assessment will involve the taking of a listed species, a permit under section 10 of the Act (16 U.S.C. 1539) and part 17 of this title (with respect to species under the jurisdiction of the FWS) or parts 220, 222, and 227 of this title (with respect to species under the jurisdiction of the NMFS) is required.

(i) *Completion time.* The Federal agency or the designated non- Federal representative shall complete the biological assessment within 180 days after its initiation (receipt of or concurrence with the species list) unless a different period of time is agreed to by the Director and the Federal agency. If a permit or license applicant is involved, the 180-day period may not be extended unless the agency provides the applicant, before the close of the 180-day period, with a written statement setting forth the estimated length of the proposed extension and the reasons why such an extension is necessary.

(j) *Submission of biological assessment.* The Federal agency shall submit the completed biological assessment to the Director for review. The Director will respond in writing within 30 days as to whether or not he concurs with the findings of the biological assessment. At the option of the Federal agency, formal consultation may be initiated under § 402.14(c) concurrently with the submission of the assessment.

(k) *Use of the biological assessment.* (1) The Federal agency shall use the biological assessment in determining whether formal consultation or a conference is required under § 402.14 or § 402.10, respectively. If the biological assessment indicates that there are no listed species or critical habitat present that are likely to be adversely affected by the action and the Director concurs as specified in paragraph (j) of this section, then formal consultation is not required. If the biological assessment indicates that the action is not likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat, and the Director concurs, then a conference is not required.

(2) The Director may use the results of the biological assessment in (i) determining whether to request the Federal agency to initiate formal consultation or a conference, (ii) formulating a biological opinion, or (iii) formulating a preliminary biological opinion.

§ 402.13 Informal consultation.

(a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

(b) During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat.

§ 402.14 Formal consultation.

(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he

identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) *Initiation of formal consultation.* A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(d) *Responsibility to provide best scientific and commercial data available.* The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) *Duration and extension of formal consultation.* Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

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

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) *Additional data.* When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the

Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) *Service responsibilities.* Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take may occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) *Biological opinions.* The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a ''jeopardy biological opinion''); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a ''no jeopardy'' biological opinion). A ''jeopardy'' biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that

to the best of its knowledge there are no reasonable and prudent alternatives.

(i) *Incidental take.* (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species;

(ii) Specifies those reasonable and prudent measures that the Director 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 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 220.45 and 228.5 for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(j) *Conservation recommendations.* The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) *Incremental steps.* When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) *Termination of consultation.* (1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that

its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

[51 FR 19957, June 3, 1986, as amended at 54 FR 40350, Sept. 29, 1989]

§ 402.15 Responsibilities of Federal agency following issuance of a biological opinion.

(a) Following the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion.

(b) If a jeopardy biological opinion is issued, the Federal agency shall notify the Service of its final decision on the action.

(c) If the Federal agency determines that it cannot comply with the requirements of section 7(a)(2) after consultation with the Service, it may apply for an exemption. Procedures for exemption applications by Federal agencies and others are found in 50 CFR part 451.

§ 402.16 Reinitiation of formal consultation.

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

(a) If the amount or extent of taking specified in the incidental take statement is exceeded;

(b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may be affected by the identified action.

Subpart C—Counterpart Regulations for Implementing the National Fire Plan

SOURCE: 68 FR 68264, Dec. 8, 2003, unless otherwise noted.

§ 402.30 Definitions.

The definitions in § 402.02 are applicable to this subpart. In addition, the following definitions are applicable only to this subpart.

Action Agency refers to the Department of Agriculture Forest Service (FS) or the Department of the Interior Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), Fish and Wildlife Service (FWS), or National Park Service (NPS).

Alternative Consultation Agreement (ACA) is the agreement described in § 402.33 of this subpart.

Fire Plan Project is an action determined by the Action Agency to be within the scope of the NFP as defined in this section.

National Fire Plan (NFP) is the September 8, 2000, report to the President from the Departments of the Interior and Agriculture entitled ''Managing the Impact of Wildfire on Communities and the Environment'' outlining a new approach to managing fires, together with the accompanying budget requests, strategies, plans, and direction, or any amendments thereto.

Service Director refers to the FWS Director or the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration.

§ 402.31 Purpose.

The purpose of these counterpart regulations is to enhance the efficiency and effectiveness of the consultation process under section 7 of the ESA for Fire Plan Projects by providing an optional alternative to the procedures found in §§ 402.13 and 402.14(b) of this part. These regulations permit an Action Agency to enter into an Alternative Consultation Agreement (ACA) with the Service, as described in § 402.33, which will allow the Action Agency to determine that a Fire Plan Project is ''not likely to adversely affect'' (NLAA) a listed species or designated critical habitat without formal

101ST CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
101-641

GRAND CANYON PROTECTION ACT OF 1990

JULY 30, 1990.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. UDALL, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany H.R. 4498]

[Including cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 4498) to amend the Colorado River Storage Project Act, to direct the Secretary of the Interior to establish and implement emergency interim operational criteria at Glen Canyon Dam, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Page 1, line 3, strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Grand Canyon Protection Act of 1990".

SEC. 2. FINDINGS.

The Congress finds that:

(a) Current operational practices at Glen Canyon Dam, including fluctuating water releases made for the enhanced production of "peaking" hydroelectric power, have substantial adverse effects on downstream environmental and recreational resources, including resources located within Grand Canyon National Park. Flood releases from Glen Canyon Dam have damaged beaches and terrestrial resources. Damage from flood releases can be reduced if the frequency of flood releases is reduced, as has been the practice in recent years.

(b) The Secretary of the Interior (hereafter referred to as "the Secretary") announced on July 27, 1989, the preparation of an environmental impact statement (EIS) to evaluate the impacts of Glen Canyon Dam operations on downstream environmental and recreational resources. Based in part on information developed during the EIS process, the Secretary will be in a position to make informed decisions regarding possible changes to current operational procedures for Glen Canyon Dam.

39-006

SEC. 8. ENDANGERED SPECIES ACT.

Notwithstanding the provisions of section 4 of this Act, nothing in this Act shall be interpreted as modifying or amending the provisions of the Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.) with regard to the operation of Glen Canyon Dam.

I. INTRODUCTION

A. PURPOSES

The primary purpose of H.R. 4498 is to take immediate and lasting steps to protect the resources of the Grand Canyon. The bill does this by responding to conclusions reached by the Department of the Interior in the 1988 Final Report of the Glen Canyon Environmental Studies (GCES). That report followed more than six years of study and analysis in a broad range of scientific disciplines. Among the conclusions of the report was a determination that "some aspects of the operation of Glen Canyon Dam have substantial adverse effects on downstream environmental and recreational resources." The GCES found that changes in operation of Glen Canyon Dam could reduce the resource losses occurring under current operations and, in some cases, even improve the status of the resources. H.R. 4498 also addresses an institutional reluctance by the Bureau of Reclamation to respond to the evidence of damage and eliminates confusion and uncertainty between the Bureau and the Western Area Power Administration regarding the statutory authorities that govern operation of the power generating facilities at the dam.

H.R. 4498 directs the Secretary of the Interior to operate Glen Canyon Dam to protect, mitigate adverse impacts to, and improve the condition of the environmental, cultural and recreational resources of Grand Canyon National Park and Glen Canyon National Recreation Area downstream of Glen Canyon Dam. The bill directs the Secretary to develop and implement interim operating procedures for Glen Canyon Dam to protect downstream resources while an environmental impact statement is prepared on operations of the dam. The bill directs the Secretary to implement long-term operating procedures for Glen Canyon Dam that will protect downstream resources, and to take other reasonable measures to mitigate impacts, based on the findings and conclusions of the environmental impact statement and other studies. Finally, the bill requires the Secretary to implement a long-term monitoring program to ensure that downstream resources are protected from damages caused by operations at Glen Canyon Dam.

B. BACKGROUND AND NEED FOR THE LEGISLATION

Colorado River Storage Project

The Colorado River Storage Project (CRSP) was authorized by the Act of April 11, 1956 (70 Stat. 105, chapter 203; 43 U.S.C. 620 et seq.; P.L. 84-485). CRSP is a complex system of four main storage projects on the Colorado River and its tributaries upstream of Lees Ferry, Arizona, plus eleven "participating projects" constructed for irrigation and other uses in the Upper Colorado River Basin. The general purpose of CRSP is to initiate the comprehensive development of the water resources of the Colorado River Basin. The more

specific purposes of CRSP, as stated in the 1956 authorization, are to:

—Regulate the flow of the Colorado River;
—Store water for beneficial consumptive use;
—Provide for the reclamation of arid and semiarid land;
—Control floods; and,
—Generate hydroelectric power, as an incident to the foregoing purposes.

Glen Canyon Dam

Glen Canyon Dam was included in the 1956 authorization as the major water storage feature of the Colorado River Storage Project. The dam is located on the Colorado River near Lees Ferry, Arizona, some 30 miles upstream from the easternmost boundary of Grand Canyon National Park. The dam is the key structure for controlling deliveries of Colorado River water to the Lower Colorado River Basin States. Lake Powell, the reservoir created by Glen Canyon Dam, has a total storage capacity of 27,000,000 acre-feet. After the dam was closed and Lake Powell began storing water in March of 1963, it took seventeen years to completely fill the reservoir.

The primary purpose of Glen Canyon Dam as part of the larger CRSP system in to enable the states of Utah, Colorado, Wyoming, and New Mexico to utilize their apportionment of Colorado River water and meet their obligations for water delivery to the states of Arizona, California, and Nevada. Lake Powell and other CRSP reservoirs allow the Upper Basin states to take water year-round from the Upper Colorado River for consumptive uses and still store enough spring runoff in Lake Powell to guarantee the required compact deliveries to the Lower Basin states even during a long period of drought.

Operation of Glen Canyon Dam

The operation of Glen Canyon Dam is controlled by the Bureau of Reclamation to meet project purposes, consistent with the laws, compacts and court decisions regarding Colorado River operations, collectively know as the "Law of the River". The major operational goal for Glen Canyon Dam is water storage and delivery to the Lower Colorado River Basin.

The operation of Glen Canyon Dam is a twofold procedure. First, the monthly and annual volumes of water to be stored and released for international treaty and interstate compact purposes are determined annually by the Secretary of the Interior based upon water supply considerations, water delivery requirements, and the avoidance of anticipated spills from Lake Powell ("spills" being releases in excess of powerplant capacity, which releases are also referred to as "flood releases"). Second, given the monthly volumes of water to be released within-the-month (i.e., daily and weekly) fluctuations in releases are made in accordance with hydroelectric power generation needs as determined by the Western Area Power Administration.

Monthly and annual reservoir operations are governed by, among other things, the Mexican Water Treaty, the Colorado River Compact, the Upper Colorado River Basin Compact, Title VI of the

Colorado River Basin Project Act of 1968 (the 1968 Act) and the "Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs" (the Coordinated, Long-Range Operating Criteria) promulgated pursuant thereto in 1970. These operational constraints, as well as others, take precedence over power operations (as is provided for by section 1 of the Colorado River Storage Project Act of 1956 (the 1956 Act) and by section 602(c) of the 1968 Act), and over the vacating of reservoir space to reduce the probability of future flood releases (as is provided for by section 602(a)(3) of the 1968 Act).

A more detailed description of the operation of Glen Canyon Dam is included in this report as Appendix "A".

Impacts of Dam Operations on Downstream Resources

1. Summary of Impacts

According to the 1988 Final Report of the Glen Canyon Environmental Studies, two aspects of current operations have "substantial impacts" on downstream resources: flood releases and fluctuating releases.

Flood releases are defined as releases greater than the designated powerplant capacity which are discharged through the river outlet works and the spillways.

Fluctuating releases are made when the dam is being operated to produce peaking power.

Flood releases cause damage to beaches and terrestrial resources, according to the GCES report. During flood releases, substantial quantities of riparian vegetation are scoured away, drowned, or buried by re-deposited sand. In addition, because the dam cuts off the main pre-dam source of sediment to the river downstream, flood releases of sediment-free water cause significant and irreversible degradation of the environment by eroding a substantial portion of the sand deposits. These deposits provide substrate for riparian vegetation and wildlife habitat and are highly valued as campsites by boaters.

The probability that flood releases will have to be made in a given year has been substantially reduced by an informal change in Glen Canyon Dam operations. Prior to this change in operations, flood releases could be expected to occur about once in every four years. By changing reservoir storage targets and improving techniques for forecasting runoff, flood releases now can be expected only about once in every twenty years. However, according to the GCES report, current knowledge indicates that even a frequency as low as one flood in twenty years will produce a net long-term loss of camping beaches and substrate, although at a rate reduced from that caused by operations that result in floods one out of every four years. The Committee again notes that the agreement to change dam operations to reduce the probability of flood releases is informal and not in writing, and thus could be changed at any time.

Fluctuating releases primarily affect recreation and aquatic resources. Except during periods of very high runoff, the amount of water released from Glen Canyon Dam is varied on an hourly basis. This is done to provide electrical power when it is most needed during the day. These fluctuations can cause the river level

to change by up to 13 feet within the space of a few hours, in locations close to the dam. Fluctuating releases stay below the powerplant capacity of 31,500 cubic feet per second (cfs) and are therefore not as detrimental as floods for terrestrial resources. However, they have a deleterious effect on recreation and aquatic resources.

2. Discussion

When Congress in 1956 authorized the construction of the Glen Canyon Dam as part of the Colorado River Storage Project, the downstream effects of dam operations were not raised. It was not known, for example, that the use of the dam for the maximum possible production of "peaking" power would damage and degrade the fragile environment of the Grand Canyon along the Colorado River. After over twenty-five years of dam operations, however, the harm resulting from such dam operations has become painfully apparent.

As power operations at Glen Canyon Dam shifted in the 1970s and early 1980s (partially in response to the oil embargo) toward using the dam primarily as a peaking power facility, many expressed concern that the variability and timing of flows from the dam were harming resources downstream. Since dam operations began before passage of the National Environmental Policy Act (NEPA), the environmental effects of operating Glen Canyon Dam had never been comprehensively studied. The effects of shifting to greater peak-period operations were never analyzed.

The fact that damn operations adversely affected the Grand Canyon was not, however, lost on those who work in and enjoy the canyon's wonders. During the 1970s, at least three lawsuits were filed challenging the Bureau of Reclamation's failure to evaluate Glen Canyon Dam operations under the National Environmental Policy Act (NEPA). *Grand Canyon Dories* v. *Walker,* 500 F.2d 588 (10th Cir. 1974); *Badoni* v. *Higginson,* 638 F.2d 172 (10th Cir. 1980); *Environmental Defense Fund* v. *Higginson,* 655 F.2d 1244 (D.C. Cir. 1981). Although each of these three suits was dismissed, the courts never held that Glen Canyon Dam operations should be free from NEPA analysis. To the contrary, the rationale for dismissing the last two cases rested on assurances by the Interior Department and the Bureau of Reclamation that the environmental consequences of dam operations would in fact be reviewed.

The Bureau of Reclamation, however, continued to postpone the decision to prepare an environmental impact statement (EIS). In 1982, after considerable controversy arose over proposed changes in the powerplant to increase the capacity, and hence the peaking operations, of Glen Canyon Dam, the Commissioner of the Bureau finally ordered some environmental review. Rather than preparing an EIS, the Bureau and cooperating agencies in the Department of the Interior began the "Glen Canyon Environmental Studies." These scientific studies were to review the question of whether dam operations were having an adverse impact on the Grand Canyon, and whether alternative operations could address environmental problems.

The Glen Canyon Environmental Studies concluded in January 1988 that ongoing dam operations were damaging the canyon environment and that alternative operations could relieve this damage

to some extent. The Bureau still did not begin preparation of an environmental impact statement to evaluate alternatives for dam operations; rather, a second round of studies called the "Glen Canyon Environmental Studies phase II" was begun, at the direction of the Assistant Secretary for Water and Science and the Assistant Secretary for Fish and Wildlife and Parks. Phase II of the GCES was intended to study the economic impacts of normal operations and other subjects not covered in Phase I.

Substantial public outcry followed the decision not to prepare an EIS, and the constant foot-dragging of the Federal agencies. Finally, in response to growing public pressure, the Secretary of the Interior announced in July, 1989 that an environmental impact statement on Glen Canyon Dam operations would be prepared.

Even after that announcement and the several years of advance studies, preparation of the EIS has been slow to begin. The "scoping" hearings on the EIS were not completed until the end of March, 1990. Some concerned agencies were initially omitted from the list of "cooperating" agencies for purposes of the EIS. And the entire process has been clouded by arguments over the priority to be given to protection of the Grand Canyon, in comparison with power production and other project purposes. As preparation of the EIS begins, damage caused by current operations of the dam continues.

As a result, the Committee believes that legislation *directing* that an EIS be prepared, and *directing* that new interim and long-term operating procedures be implemented, is necessary. The Committee is very reluctant to "micro-manage" the operation of Federal facilities. However, after years of empty promises and mounting evidence that a priceless resource was being negatively impacted, the Committee felt compelled to take strong action. H.R. 4498 is the result.

II. Explanation of the Bill

SECTION 1. SHORT TITLE

The short title of this bill is the "Grand Canyon Protection Act of 1990".

SECTION 2. FINDINGS

This section expresses four findings:

(a) That current operational practices at Glen Canyon Dam, including fluctuating water releases made for the enhanced production of "peaking" hydroelectric power, have substantial adverse effects on downstream environmental and recreational resources, including resources located within Grand Canyon National Park. Flood releases from Glen Canyon Dam have damaged beaches and terrestrial resources. Damage from flood releases can be reduced if the frequency of flood releases is reduced, as has been the practice in recent years.

(b) That the Secretary of the Interior announced on July 27, 1989, the preparation of an environmental impact statement (EIS) to evaluate the impacts of Glen Canyon Dam operations on downstream environmental and recreational resources. Based in part on

102D CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPT. 102-114
Part 1

RECLAMATION PROJECTS AUTHORIZATION AND ADJUSTMENT ACT OF 1991

JUNE 18, 1991.—Ordered to be printed

Mr. MILLER of California, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

together with

SUPPLEMENTAL and DISSENTING VIEWS

[To accompany H.R. 429]

[Including cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill, H.R. 429, to authorize additional appropriations for the construction of the Buffalo Bill Dam and Reservoir, Shoshone Project, Pick-Sloan Missouri Basin Program, Wyoming, having considered the same, report favorably thereon with amendments and recommend that the bill, as amended, pass.

The amendments are as follows:

On page 1, line 3, strike all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Reclamation Projects Authorization and Adjustment Act of 1991".

SEC. 2. DEFINITION OF SECRETARY.

For the purposes of this Act, the term "Secretary" means the Secretary of the Interior.

TITLE I—BUFFALO BILL DAM AND RESERVOIR, WYOMING

SEC. 101. ADDITIONAL AUTHORIZATION OF APPROPRIATIONS FOR BUFFALO BILL DAM AND RESERVOIR, SHOSHONE PROJECT, PICK-SLOAN MISSOURI BASIN PROGRAM.

Title I of Public Law 97-293 (96 Stat. 1261) is amended as follows:

(1) In the second sentence of section 101, by striking "replacing the existing Shoshone Powerplant," and inserting "constructing power generating facilities with a total installed capacity of 25.5 megawatts,".

Action in the 101st Congress

On June 14, 1990, the House of Representatives passed H.R. 2567 to make substantial changes to the Federal reclamation program, but no agreement was reached with the Senate, and the bill died. In general, the provisions of H.R. 2567 which amended the Federal reclamation program clarified the 1982 Act by defining farms or farm operations. These amendments, as passed by the House, were based on recommendations contained in the GAO reports.

The amendments to the 1982 Act established a rebuttable presumption that multiple landholdings would be considered a single farm (or farm operation) if ownership, operation, management, financing or other factors, individually or together, indicate that farming or operating such landholdings is being done by the same individual, group, entity, trust, or other arrangment or combination. The presumption would not have been initiated, however, by the mere sharing of labor, equipment or services by family members where such sharing was not part of a larger direct or indirect joint operation or management.

In addition, H.R. 2567 imposed the acreage limits upon the aggregate landholdings of trusts in order to eliminate the type of Westhaven Trust avoidance scheme. This change was made effective 180 days after enactment of H.R. 2567 into law. Thus, the House action in the 101st Congress would have precluded trusts from serving as a vehilce for avoiding the acreage limits, and placed a burden upon the farmer to demonstrate the absence of a combination, arrangement or other collective organization that would render the farmer ineligible for Federally subsidized reclamation water.

Committee action in 102d Congress

On April 24, 1991, the Subcommittee on Water, Power and Offshore Energy Resources agreed to include the Reclamation Reform Act Amendments of 1991 as title XVII of the amendment in the nature of a substitute to H.R. 429. The bill, as amended, was referred to the full Committee. Title XVII was identical to provisions of H.R. 2567, as agreed to by the House of Representatives in the 101st Congress.

On May 1, 1991, the full Committee adopted Title XVII as recommended by the Subcommittee after accepting amendments offered by Mr. Lehman of California. These changes represented a difference from the language of H.R. 2567 which passed the House in the 101st Congress. In general, Title XVII, as amended, provides clear guidelines on the types of activities which would, if present, create a single farm or farm operation for purposes of the 960 acre limit. In addition, the Lehman amendments provide a transition period during which certain smaller trusts could operate as a farm or farm operation without losing federally subsidized water.

TITLE XVIII—GRAND CANYON PROTECTION

Title XVIII is identical to H.R. 814.

Introduction

The primary purpose of Title XVIII of H.R. 429 is to take immediate and lasting steps to protect the resources of the Grand

Canyon. Title XVIII does this by responding to conclusions reached by the Department of the Interior in the 1988 Final Report of the Glen Canyon Environmental Studies (GCES). That report followed more than six years of study and analysis in a broad range of scientific disciplines. Among the conclusion of the report was a determination that "some aspects of the operation of Glen Canyon Dam have substantial adverse effects on downstream environmental and recreational resources." The GCES found that changes in operation of Glen Canyon Dam could reduce the resources losses occurring under current operations and, in some cases, even improve the status of the resources. Title XVIII also addresses an institutional reluctance by the Bureau of Reclamation to respond to the evidence of damage and eliminates confusion and uncertainly between the Bureau and the Western Area Power Administration regarding the statutory authorities that govern operation of the power generating facilities at the dam.

Title XVIII directs the Secretary of the Interior to operate Glen Canyon Dam to protect, mitigate adverse impacts to, and improve the condition of the environmental, cultural and recreational resources of Grand Canyon National Park and Glen Canyon National Recreation Area downstream of Glen Canyon Dam. The title directs the Secretary to develop and implement interim operating procedures for Glen Canyon Dam to protect downstream resources while an environmental impact statement is prepared on operations of the dam. The title directs the Secretary to implement long-term operating procedures for Glen Canyon Dam that will protect downstream resources, and, if necessary, to take other reasonable measures to mitigate impacts, based on the findings and conclusions of the environmental impact statement and other studies. Finally, title XVIII requires the Secretary to implement long-term monitoring program to ensure that downstream resources are protected from damages caused by operations at Glen Canyon Dam.

Glen Canyon Dam

Glen Canyon Dam was included in the 1956 authorization as the major water storage feature of the Colorado River Storage Project (CRSP).[6] The dam is located on the Colorado River near Les Ferry, Arizona, some 30 miles upstream from the easternmost boundary of Grand Canyon National Park. The dam is the key structure for controlling deliveries of Colorado River water to the Lower Colorado River Basin States. Lake Powell, the reservoir created by Glen Canyon Dam, has a total storage capacity of 27,000,000 acre-feet. After the dam was closed and Lake Powell began storage water in March of 1963, it took seventeen years to completely fill the reservoir.

The primary purpose of Glen Canyon Dam as part of the larger CRSP system is to enable the states of Utah, Colorado, Wyoming, and New Mexico to utilize their apportionment of Colorado River water and meet their obligations for water delivery to the states of Arizona, California, and Nevada. Lake Powell and other CRSP reservoirs allow the Upper Basin states to take water year-round from

[6] For additional information on the Colorado River Storage Project, see the background discussion regarding the Central Utah Project, titles II–VI.

the Upper Colorado River for consumptive uses and still store enough spring runoff in Lake Powell to guarantee the required compact deliveries to the Lower Basin states even during a long period of drought.

Operation of Glen Canyon Dam

The operation of Glen Canyon Dam is controlled by the Bureau of Reclamation to meet project purposes, consistent with the laws, compacts and court decisions regarding Colorado River operations, collectively known as the "Law of the River". The major operational goal for Glen Canyon Dam is water storage and delivery to the Lower Colorado River Basin.

The operation of Glen Canyon Dam is a twofold procedure. First, the annual volumes of water to be stored and released for international treaty and interstate compact purposes are determined annually by the Secretary of the Interior based upon water supply considerations, water delivery requirements, and the avoidance of anticipated spills from Lake Powell ("spills" being releases in excess of powerplant capacity, which releases are also referred to as "flood releases"). Second, given the monthly volumes of water scheduled to be released, within-the-month (i.e., daily and weekly) fluctuations in releases are made in accordance with hydroelectric power generation needs as determined by the Western Area Power Administration.

Annual reservoir operations are governed by, among other things, the Mexican Water Treaty, the Colorado River Compact, the Upper Colorado River Basin Compact, Title VI of the Colorado River Basin Project Act of 1968 (the 1968 Act) and the "Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs" (the Coordinated, Long-Range Operating Criteria) promulgated pursuant thereto in 1970. These operational constraints, as well as others, take precedence over power operations (as is provided for by section 1 of the Colorado River Storage Project Act of 1956 (the 1956 Act) and by section 602(c) of the 1968 Act), and over the vacating of reservoir space to reduce the probability of future flood releases (as is provided for by section 602(a)(3) of the 1968 Act).

A more detailed description of the operation of Glen Canyon Dam can be found in the reports of the Glen Canyon Environmental Studies and in Appendix "A" of the report of the Committee on Interior and Insular Affairs on H.R. 4498, "Grand Canyon Protection Act of 1990", dated June 30, 1990 (House Report 101-641).

Impacts of dam operations on downstream resources

1. Summary of Impacts.—According to the 1988 Final Report of the Glen Canyon Environmental Studies, two aspects of current operations have "substantial impacts" on downstream resources: flood releases and fluctuating releases.

Flood releases are defined as releases greater than the designated powerplant capacity which are discharged through the river outlet works and the spillways.

Fluctuating releases are made when the dam is being operated to produce peaking power.

Flood releases cause damage to beaches and terrestrial resources, according to the GCES report. During flood releases, substantial

quantities of riparian vegetation are scoured away, drowned, or buried by re-deposited sand. In addition, because the dam cuts off the main pre-dam source of sediment to the river downstream, flood releases of sediment-free water cause significant and irreversible degradation of the environment by eroding a substantial portion of the sand deposits. These deposits provide substrate for riparian vegetation and wildlife habitat and are highly valued as campsites by boaters.

The probability that flood releases will have to be made in a given year has been substantially reduced by an informal change in Glen Canyon Dam operations. Prior to this change in operations, flood releases could be expected to occur about once in every four years. By changing reservoir storage targets and improving techniques for forecasting runoff, flood releases now can be expected only about once in every twenty years. However, according to the GCES report, current knowledge indicates that even a frequency as low as one flood in twenty years will produce a net long-term loss of camping beaches and substrate, although at a rate reduced from that caused by operations that result in floods one out of every four years. The Committee again notes that the agreement to change dam operations to reduce the probability of flood releases is informal and not in writing, and thus could be changed at any time.

Fluctuating releases primarily affect recreation and aquatic resources. Except during periods of very high runoff, the amount of water released from Glen Canyon Dam is varied on an hourly basis. This is due to provide electrical power when it is most needed during the day. These fluctuations can cause the river level to change by up to 13 feet within the space of a few hours, in locations close to the dam. Fluctuating releases stay below the powerplant capacity of 31,500 cubic feet per second (cfs) and are therefore not as detrimental as floods for terrestrial resources. However, they have a deleterious effect on recreation and aquatic resources.

2. Discussion.—When Congress in 1956 authorized the construction of the Glen Canyon Dam, the downstream effects of dam operations were not raised. It was not known, for example, that the use of the dam of the maximum possible production of "peaking" power would damage and degrade the fragile environment of the Grand Canyon along the Colorado River. After over twenty-five years of dam operations, however, the harm resulting from such dam operations has become painfully apparent.

As power operations at Glen Canyon Dam shifted in the 1970s and early 1980s (partially in response to the oil embargo) toward using the dam primarily as a peaking power facility, many expressed concern that the variability and timing of flows from the dam were harming resources downstream. Since dam operations began before passage of the National Environmental Policy Act (NEPA), the environmental effects of operating Glen Canyon Dam had never been comprehensively studied. The effects of shifting to great peak-period operations were never analyzed.

The fact that dam operations adversely affected the Grand Canyon was not, however, lost on those who work in and enjoy the canyon's wonders. During the 1970s, at least three lawsuits were filed challenging the Bureau of Reclamation's failure to evaluate Glen Canyon Dam operations under the National Environmental

Policy Act (NEPA). *Grand Canyon Dories* v. *Walker,* 500 F.2d 588 (10th Cir. 1974); *Badoni* v. *Higginson,* 638 F.2d 172 (10th Cir. 1980); *Environmental Defense Fund* v. *Higginson,* 655 F.2d 1244 (D.C. Cir. 1981). Although each of these three suits was dismissed, the courts never held that Glen Canyon Dam operations should be free from NEPA analysis. To the contrary, the rationale for dismissing the last two cases rested on assurances by the Interior Department and the Bureau of Reclamation that the environmental consequences of dam operations would in fact be reviewed.

The Bureau of Reclamation, however, continued to postpone the decision to prepare an environmental impact statement (EIS). In 1982, after considerable controversy arose over proposed changes in the powerplant to increase the capacity, and hence the peaking operations, of Glen Canyon Dam, the Secretary of the Interior finally ordered some environmental review. Rather than preparing an EIS, the Bureau and cooperating agencies in the Department of the Interior began the "Glen Canyon Environmental Studies." These scientific studies were to review the question of whether dam operations were having an adverse impact on the Grand Canyon, and whether alternative operations could address environmental problems.

The Glen Canyon Environmental Studies concluded in January 1988 that ongoing dam operations were damaging the canyon environment and that alternative operations could relieve this damage to some extent. The Bureau still did not begin preparation of an environmental impact statement to evaluate alternatives for dam operations; rather, a second round of studies called the "Glen Canyon Environmental Studies Phase II" was begun, at the direction of the Assistant Secretary for Water and Science and the Assistant Secretary for Fish and Wildlife and Parks. Phase II of the GCES was intended to study the economic impacts of normal operations and other subjects not covered in Phase I.

Substantial public outcry followed the decision not to prepare an EIS. Finally, in response to the foot-dragging of the Federal agencies and growing public pressure, the Secretary of the Interior announced in July, 1989 that an environmental impact statement on Glen Canyon Dam operations would be prepared.

Even after that announcement and the several years of advance studies, preparation of the EIS has been slow to begin. The "scoping" hearings on the EIS were not completed until the end of March, 1990. Some concerned agencies were initially omitted from the list of "cooperating" agencies for purposes of the EIS. And the entire process has been clouded by arguments over the priority to be given to protection of the Grand Canyon, in comparison with power production and other project purposes. As preparation of the EIS continues, damage caused by current operations of the dam continues.

As a result, the Committee believes that legislation directing that an EIS be prepared, and directing that new interim and long-term operating procedures be implemented, is necessary. The Committee is very reluctant to "micro-manage" the operation of Federal facilities. However, after years of empty promises and mounting evidence that a priceless resource was being negatively impacted,

the Committee felt compelled to take strong action. Title XVIII of H.R. 429 is the result.

TITLE XIX—MID-DAKOTA RURAL WATER SYSTEM

Title XIX would authorize the construction of a municipal, industrial and rural water system in central South Dakota to provide safe and reliable drinking water in Beadle County (including the City of Huron), Buffalo, Hand, Hughes, Hyde, Jerauld, Potter, Sanborn, Spink, and Sully Counties, and elsewhere in South Dakota.

Title XIX, as amended, provides that the Secretary shall make grants and loans to Mid-Dakota Rural Water System, Inc., a local non-profit entity, for the planning and construction of the water system. The Secretary will be responsible for insuring that the quality of construction meets Federal standards.

The total project cost (in 1989 dollars) is $108,400,000. The Federal government is authorized to appropriate to the Secretary $100,000,000 for the planning and construction of the water system, plus such sums necessary to defray increases in development costs reflected in appropriate engineering cost indices after October 1, 1989. The Federal government will contribute 85 percent of the authorized appropriation in grants and 15 percent in a loan or loans for the planning and construction costs. The loan or loans made by the Federal government shall be repaid, with interest, within thirty years from the date of each loan. There will be no penalty for pre-payment of the loan or loans and interest on the loan or loans will not accrue during planning and construction of the water system. The first payment on such a loan shall not be due until after completion of construction of the water system. Interest on such a loan shall be determined by the Secretary of the Treasury on the basis of the weighted average yield of all interest bearing, marketable issues sold by the Treasury during the fiscal year in which the expenditures by the United States were made. The State of South Dakota will contribute $8,400,000. The Mid-Dakota Rural Water System Inc. will pay 100 percent of operation and maintenance costs.

The Title, as amended, requires certain water conservation and wildlife mitigation. Since water is such a precious commodity in South Dakota, comprehensive water conservation programs will be instituted before the Secretary may obligate Federal funds. These programs will use the best practicable technology and management techniques to reduce water use and water system costs.

The Title, as amended, provides for a Wetland Trust to be administered by the South Dakota Game, Fish and Parks Foundation, a nonprofit corporation under the laws of the State of South Dakota with its principal office in South Dakota. The Wetland Trust will operate to preserve, enhance, restore, and manage wetland and associated wildlife habitat in the State of South Dakota. Since the preservation and enhancement of wetlands is in the national interest, the Federal government will contribute 100 percent of the costs of the Wetland Trust. These funds shall be nonreimbursable and nonreturnable. The Federal government shall contribute $2,756,000 for the initial development of the wetland component and $7,000,000 for the Federal contribution to the Wetland Trust. The

The Secretary is directed to review the full cost charges applied to prior law recipients who filed an irrevocable election under section 203(b) of the 1982 Reform Act between May 13, 1987, and January 1, 1988, in order to determine if the assessment of such charges was appropriate. The Committee expects the Secretary will examine each case to determine whether the amount assessed is commensurate with the severity of the violation. Following such a review, the Secretary is authorized to reduce or rescind the amount.

The Secretary's review process should include the following:

(1) The Secretary should take into consideration the status of prior law recipients before May 13, 1987, and after filing their forms. If these individuals were in compliance before May 13, 1987, and were in compliance after filing the forms, they should not be harshly penalized.

(2) In some cases, a legal entity filed its forms but the individuals within the entity did not file on time. The Secretary should consider providing relief to those individuals where the entity properly filed but some or all of the individuals members did not.

(3) The Commission of the Bureau of Reclamation required filing of irrevocable elections by May 13, 1987, but gave all others until August 1, 1987, to file their forms. The Secretary should consider providing relief to those prior law recipients who met the August 1, filing date.

(4) In cases which do not fall under the specific criteria listed above, the Secretary should consider granting relief upon a clear demonstration of good faith efforts to comply with the law by a prior law recipient. Good faith efforts should be supported by tangible evidence that clearly shows what efforts were made and why the efforts were unsuccessful.

Section 1710. Application to Indian Lands

This section has been included to make it clear that the Reclamation Reform Act of 1982 (RRA) does not apply to Indian trust and restricted lands. The 1982 Act was never intended to be applicable to Indian lands. By its terms, the Act was directed at districts established under state law, receiving water from Reclamation projects through a contract with the Secretary. Since "districts" by definition do not include Indian tribes or reservations, the 1982 Act should not be construed to apply to such lands.

To avoid any further ambiguity, the Committee added this section to clarify that the 1982 Act does not apply to Indian trust or restricted Indian lands.

TITLE XVIII—GRAND CANYON PROTECTION

Sec. 1801. Short Title.—The short title of this title is the "Grand Canyon Protection Act."

Sec. 1802. Findings.—This section expresses three findings:

(a) That current operational practices at Glen Canyon Dam, including fluctuating water releases made for the enhanced production of "peaking" hydroelectric power, have substantial adverse effects on downstream environmental and recreational resources, including resources located within Grand Canyon National Park.

Flood releases from Glen Canyon Dam have damaged beaches and terrestrial resources. Damage from flood releases can be reduced if the frequency of flood releases is reduced, as has been the practice in recent years.

(b) That the Secretary of the Interior announced on July 27, 1989, the preparation of an environmental impact statement (EIS) to evaluate the impacts of Glen Canyon Dam operations on downstream environmental and recreational resources. Based in part on information developed during the EIS process, the Secretary will be in a position to make informed decisions regarding possible changes to current operational procedures for Glen Canyon Dam.

(c) That the adverse effects of current operations of Glen Canyon Dam are significant and can be at least partially mitigated by the development and implementation of interim operating procedures pending the completion of the EIS, the Glen Canyon Environmental Studies, and the adoption of new long-term operating procedures for Glen Canyon Dam.

Sec. 1803. Definitions.—This section defines the terms "Colorado River Compact"; "Upper Colorado River Basin Compact"; and "Secretary".

Sec. 1804. Protection of Grand Canyon National Park.—The purpose and intent of section 1804 is simple. This language is intended as a clear, concise directive to the Secretary on how to operate Glen Canyon Dam. The Secretary must operate the dam to protect the downsteam resources within the context of the Secretary's water compact responsibilities and other elements of the "Law of the River". For the last sixteen years, the Secretary appears to have ignored these resource protection responsibilities in favor of maximizing the production of peaking power. Section 1804 is intended to provide clear direction to the Secretary as to what his responsibilities are.

Section 1804(a) directs the Secretary of the Interior to operate Glen Canyon Dam and, if necessary, take other reasonable mitigation measures to protect, mitigate adverse impacts to, and improve the condition of the environmental, cultural and recreational resources of Grand Canyon National Park and Glen Canyon National Recreation Area downstream of Glen Canyon Dam. The Secretary's actions would be subject to and consist with the water storage and delivery functions of Glen Canyon Dam pursuant to the Colorado River Compact and other elements of the "Law of the River".

The Committee also notes that the direction to take "other reasonable mitigation measures" in sections 1804(a), 1804(c), and 1806(c) is not a free-standing requirement. The clear purpose of title XVIII is to effect changes in the operation of Glen Canyon Dam which have been shown to cause damage to downstream environmental, cultural, and recreational resources. It is not the intent of this legislation to impose a second layer of management practices in Grand Canyon National Park. Nor will the Committee prejudge the results of the EIS. It may be that canyon resources can be protected by changes in dam operations alone, but this language allows the Secretary to consider other measures as well. If any other mitigation measures are recommended, they will have to meet the standard of protection, mitigation of damage to, and improvement of the resources downstream of the dam. This standard

requires that each potential mitigation measure be examined in light of its effects on the natural, cultural and recreational resources that Grand Canyon National Park was established to protect.

The Committee further notes that the short title of Title XVIII is the "Grand Canyon Protection Act." Protection of the Grand Canyon is the first and foremost purpose of this title. This legislation is not intended to be used as an excuse to further increase power production at Glen Canyon Dam at the expense of natural resource protection, nor is this legislation intended to afford opportunities to impose artificial and non-natural management programs upon the natural resources of the Grand Canyon under the guise of "mitigating" damages caused by dam operations. If scientific studies indicate dam operations are causing damage to the resources of the Grand Canyon, then those operations should be changed to protect the resources. Structural "mitigating measures" should be selected as a last resort if and only if scientific studies indicate that such measures would provide the highest degree of protection to the resources of the Grand Canyon. The Bureau of Reclamation's continual search for structural solutions to the problems caused by the way Glen Canyon Dam is operated is not acceptable.

The intent of the final part of section 1804(a) dealing with the water storage and delivery functions of Glen Canyon Dam, is detailed under the discussion of section 1806.

Section 1804(b)(1) amends section 3 of the Colorado River Storage Project Act by expressing the intention of Congress that the Secretary shall operate Glen Canyon Dam and, if necessary, take other reasonable mitigation measures so as to protect, mitigate damages to, and improve the condition of the environmental, cultural and recreational resources of Grand Canyon National Park and Glen Canyon National Recreation Area downstream of Glen Canyon Dam. The Secretary's actions would be subject to and consistent with the water storage and delivery functions of Glen Canyon Dam pursuant to the Colorado River Compact and other elements of the "Law of the River" (see discussion under section 1806).

Section 1804(b)(2) amends section 7 of the 1956 CRSP authorization to prohibit the Secretary from operating the hydroelectric powerplant at Glen Canyon Dam in a manner which causes significant and avoidable adverse effects on the environmental, cultural and recreational resources of Grand Canyon National Park and Glen Canyon National Recreation Area downstream of Glen Canyon Dam. The intent of this section is to make it clear that hydroelectric power production at Glen Canyon Dam is not the primary purpose of the project, and must be curtailed if power production results in significant and avoidable damages to downstream resources.

The Committee has reviewed the argument that power production is second only to water storage and delivery in operation of the Colorado River Storage Project. We find the opinion of the Western Area Power Administration's Assistant General Counsel, upon which the argument is based, unpersuasive and without foundation. For Bureau of Reclamation projects, power production has always been authorized as a purpose incidental to other project

purposes. The Colorado River Storage Project is no different. Section 1 of the Colorado River Storage Project Act and Section 102 of the Colorado River Basin Project Act clearly state that power production is incidental to the other purposes, including fish and wildlife and recreation, of the Colorado River Storage Project.

Section 1804(c) authorizes and directs the Secretary to promulgate interim and long-term operational procedures for Glen Canyon Dam and take other reasonable mitigation measures to protect downstream resources. Sections 1805 and 1806 provide details regarding these procedures and their development. Again, the term "reasonable mitigation measures" is used in this section, and the discussion included above under section 1804(a) is applicable to section 1804(c).

Section 1804(d) states that nothing in this title alters any of the purposes for which the Grand Canyon National Park or the Glen Canyon National Recreation Area were established. Management and administration of these areas are also not affected by this legislation.

Sec. 1805. Interim Operating Procedures for Glen Canyon Dam.— This section directs the Secretary to develop and implement interim operating procedures for Glen Canyon Dam. These procedures are to be in place not later than September 1, 1991, or upon cessation of research flows now in place to gather information for the environmental impact statement (EIS) discussed in section 1802 of this title. The section further specifies a number of requirements which the interim procedures must meet, and directs the Secretary to consult with specific organizations and government agencies as the interim procedures are developed. The section also requires the Secretary to use the best and most recent scientific data available in developing and implementing the interim operating procedures. The section directs that the interim procedures shall terminate when the requirements of section 1806 (long-term operating procedures) have been met. Finally, the section provides for deviations from the interim operating procedures under certain circumstances.

In order to prevent further damage to the Grand Canyon pending completion of the EIS on Glen Canyon Dam, this legislation requires that the Secretary of the Interior set interim operating criteria for the dam pending completion of the EIS. Two major purposes would be served by the Secretary's implementation of these interim operating criteria. First, the interim criteria would halt ongoing damage in the canyon by setting flows at levels that will prevent further damage. Second, they will be suspended for the duration of test (or "research") flows as necessary pursuant to section 1805(e)(1) to complete studies necessary for the preparation of the EIS and to establish a long-term monitoring regime. Thus, the interim procedures would not interfere with specific flows currently in place for research purposes. Interim flows would be used between the research flow periods and after research flows are completed to ensure that ongoing damage to the canyon is minimized until the EIS is finished and the new long-term operating procedures required by section 1806 of title XVIII are in place.

The Committee is aware that the Bureau of Reclamation has announced its intention to set interim flows without specific Congres-

sional direction.[10] However, the Bureau's previous failures to live up to its promises to protect the natural resources of the Colorado River in Grand Canyon require an unmistakable statement of Congressional intent.

The Secretary's determination and implementation of new interim flows will not be exempt from NEPA, but the Committee anticipates that this determination would not be a major federal action significantly affecting the environment. The interim flows will be set in a manner designed to minimize impacts on the natural environment and preserve the status quo until an EIS can be completed. They will last for only a few years pending completion of the EIS. The total amount of power produced at the dam will remain the same. Although the interim flows might reduce the amount of inexpensive federal power available to customers of the Western Area Power Administration during peak demand periods, there is currently surplus power in the region of the country served by CRSP facilities and the Western Area Power Administration. The reduced availability of peaking power should only have minor financial effects [11] on these customers—effects of a kind that do not warrant preparation of an EIS. We anticipate that an environmental assessment by the Bureau will reveal that the setting of interim flows is not a major federal action having significant effects on the quality of the human environment. The Committee believes that requiring an EIS on implementation of interim flows is probably not necessary.

The Committee suggests that the Secretary consider soliciting the advice of the President's Council on Environmental Quality (CEQ) if NEPA/interim flow questions arise. CEQ regulations specifically provide for "alternative arrangements" to the normal NEPA requirements when such arrangements are justified by "emergency circumstances". The Committee believes that ongoing damages to the environment of the Grand Canyon may provide sufficient justification for such alternative arrangements. All affected

---

[10] The Committee is also aware that interim flow recommendations have already been formulated by a group of scientists involved with the GCES. These recommendations are included in a report dated April 10, 1991. In addition to proposing specific interim flows for Glen Canyon Dam releases, the report states: "This report presents the initial, scientifically based recommendations and rationale for the Interim Operating Flows. It does not represent a final administrative position, and does not include integration of other water and power concerns. It is considered a conservative position to halt degradation of downstream resources." The Committee expects that these scientific proposals for interim flows will be given serious consideration by the Secretary as final decisions on interim flows at Glen Canyon Dam are made.

[11] At the request of the Subcommittee Chairman, the Western Area Power Administration (Western) and the Environmental Defense Fund (EDF) prepared estimates of the net economic impacts of implementing certain interim flow release patterns at Glen Canyon Dam. Both organizations used a computer-based simulation model to examine the net economic impacts of changes in power system operations resulting from a set of alternative water release patterns. Both reports agree that more restrictive flow release patterns at Glen Canyon Dam will not be without economic cost. The reported cost estimates, however, differ markedly. For example, under a "baseloaded" operation of near constant monthly releases (varied from month to month to meet water storage, delivery, and flood control requirements), EDF estimated the net economic cost for 1992 to be $10.7 million. Western's estimate for the same operation and year was given as a range from $21.6 million to $39.7 million. Other operational scenarios would have less of an annual cost. The full text of the EDF report, and the Executive Summary of the Western report, were included as Appendix "B" in the Committee's 1990 report on H.R. 4498 (H. Rept. 101-641).

EDF updated its information in May of 1991 to include cost estimates based on recent proposals for interim flows as proposed by GCES scientists. These updated cost estimates are included in this report as Appendix "A". The power system costs based on the recent interim flow proposals range from $8.6 million in Water Year 1992 to $14.5 million in Water Year 1995.

agencies, including the Bureau of Reclamation, the Bureau of Indian Affairs, the Fish and Wildlife Service, the National Park Service, as well as the Department's Office of Environmental Affairs, should be involved in any such consultations with CEQ, along with the Western Area Power Administration, the Environmental Protection Agency, and any other Cooperating Agencies.

Section 1805(a)(1) re-states the requirement that the interim flows not interfere with the primary water storage and delivery requirements of Glen Canyon Dam (see discussion under section 1806).

Section 1805(a)(4) requires that flood releases be kept to a minimum. The Committee included this requirement because flood releases have been shown to be especially damaging to resources in the Grand Canyon.[12] The Committee notes, however, that current low runoff and low reservoir storage conditions in the Colorado River Basin make it unlikely that flood releases will be made during the time interim flows implemented pursuant to this section are in effect. The Committee also notes the overriding requirement included throughout this title that the interim flows (including the requirement in section 1805(a)(4)) not interfere with the primary water storage and delivery requirements of Glen Canyon Dam.

The phrase "minimize to the extent reasonably possible" appears in sections 1805(a)(2), 1805(a)(3), 1805(a)(5), and 1805(a)(6). This wording was selected to provide the Secretary with clear direction to "minimize" the adverse impacts of dam operations, within a framework of "reasonableness". The Committee does not expect, for example, that the Secretary's interpretation of this phrase would require him to completely shut down power generation at Glen Canyon Dam while interim flows are in place. On the other hand, the Secretary should view this directive as the strongest possible message from the Committee that interim operating procedures for Glen Canyon Dam must provide substantially greater protection to downstream resources than is now the case.

Protection of the Grand Canyon during this interim period must not be compromised by the practice of maximizing power generation during peak demand periods each day. In particular, the Committee does not intend that measures necessary for protection of downstream resources be sacrificed out of consideration for power contract commitments that can be modified or met through other means. The testimony of Commissioner Underwood from July 24, 1990, which implied that protective operating criteria might be modified to meet peak power commitments during this period, is not consistent with the direction of this legislation to "minimize, to the extent reasonably possible," impacts on downstream resources. To the extent that operating revenues and system repayment may be affected by interim operating procedures, power prices can be modified under existing contract terms to meet statutory repayment requirements.

Sec. 1806. Glen Canyon Environmental Studies; Glen Canyon Dam Environmental Impact Statement; and Long-Term Operating

[12] Some researchers believe that, under certain hydrologic and sediment conditions, short-term floods may provide temporary relief to some of the beaches in the Grand Canyon.

Calendar No. 432

102D CONGRESS *2d Session*	SENATE	REPORT 102-267

RECLAMATION PROJECTS AUTHORIZATION AND ADJUSTMENT ACT OF 1992

MARCH 31 (legislative day, MARCH 26), 1992.—Ordered to be printed

Mr. JOHNSTON, from the Committee on Energy and Natural Resources, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 429]

The Committee on Energy and Natural Resources, to which was referred the Act (H.R. 429) to amend certain Federal reclamation laws to improve enforcement of acreage limitations, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the Act, as amended, do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Reclamation Projects Authorization and Adjustment Act of 1992".

SEC. 2. DEFINITION AND TABLE OF CONTENTS.

For purposes of this Act, the term "Secretary" means the Secretary of the Interior.

TABLE OF CONTENTS

Sec. 1. Short title.
Sec. 2. Definition and table of contents.

TITLE I—BUFFALO BILL DAM AND RESERVOIR, WYOMING

Sec. 101. Additional authorization of appropriations.

TITLE II—CENTRAL UTAH PROJECT CONSTRUCTION

Sec. 200. Short Title and Definitions for Titles II-VI.

project area and operated as a part of the Maxwell National Wildlife Refuge.

The Vermejo Project is a small irrigation project located in north-central New Mexico. The dispute at hand centers on interpretation of a 1980 Act which authorized transfer of Vermejo Project faciliteis to the District "except for lands and interests in water which may be held by the Secretary for the management of the Maxwell National Wildlife Refuge." The Act authorized transfer of all financial responsibility for project operation and maintenance to the District, except with respect to "necessary expenses for fish and wildlife purposes.

The Department of the Interior has taken the view that Lake 13 falls within the tranfser exception; the District disagrees and the resulting dispute has impeded execution of the facilities transfer contract.

Title XI would transfer Lake 13 to the District, while preserving the right of the Secretary, acting through the United States Fish and Wildlife Service, to manage Lake 13 for the conservation, maintenance, and development of the area as a component of the Maxwell National Wildlife Refuge, in accordance with an existing contract with the District, and in a manner that does not interfere with operation of the lake for Vermejo Project purposes.

Title XI is identical to title VIII of H.R. 2567, which was approved by the Senate on October 26, 1990 and S. 462, introduced by Senator Domenici on February 21, 1991.

XII. TITLE XII—GRAND CANYON PROTECTION

A. PURPOSE—TITLE XII

In general terms, title XII directs the Secretary of the Interior to operate Glen Canyon Dam, and exercise other authorities, to protect, mitigate adverse impacts on, and improve the values for which the Grand Canyon National Park and the Glen Canyon National Recreation Area were established, while preserving the dam's water storage, allocation, and delivery functions. This title responds directly to reports of environmental damage and other resource management problems in Grand Canyon National Park and Glen Canyon National Recreation Area attributed to Glen Canyon Dam, a Bureau of Reclamation facility located on the Colorado River near the Arizona-Utah border, upstrean of Grand Canyon National Park. Title XII is intended to complement and reinforce current studies udertaken by the Department of the Interior.

B. BACKGROUND AND NEED—TITLE XII

Glen Canyon Dam is the keystone of the Colorado River Storage Project (CRSP), and CRSP is the central vehicle for implementation of the congressionally approved Colorado River Compact. The Compact is, in turn, the basis for allocation of Colorado River water among the seven Colorado River Basin States.

The dam is the major power feature of the Colorado River Storage Project, supplying power for non-profit, public utilities throughout the Southwest. Power revenues are credited toward the Colorado River Storage Project Fund, which is the principal source of

funds for construction of CRSP irrigation and water supply projects. The dam impounds the Colorado River above Grand Canyon National Park and affects the quality and quantity of river water, the habitat of native and introduced species, and recreational use of the river.

Since it began filling in the 1960's, Glen Canyon Dam has been operated principally to serve water storage, allocation, and delivery purposes and, consistent with those operations, power purposes. The controversy today centers on the question whether and how dam operations—principally power operations—should be modified, or other measures undertaken, to provide additional benefit and protection to downstream resources, while avoiding interference with the dam's water storage, allocation, and distribution functions.

The Colorado River Storage Project (CRSP) was authorized by the Act of April 11, 1956 (70 Stat. 105; Pub. L. 84-485). CRSP is a complex system of four main storage projects on the Colorado River and its tributaries upstream of Lees Ferry, Arizona, plus eleven "participating projects" constructed for irrigation and other uses in the Upper Colorado River Basin. The general purpose of CRSP is to initiate the comprehensive development of the water resources of the Colorado River Basin. The more specific purposes of CRSP, as stated in the 1956 authorization, are to regulate the flow of the Colorado River, store water for beneficial comsumptive use, provide for the reclamation of arid and semiarid land, control floods, and, generate hydroelectric power, as an incident to the foregoing purposes.

Glen Canyon Dam was included in the 1956 authorization as the major water storage feature of the Colorado River Storage Project. The dam is located on the Colorado River near Lees Ferry, Arizona, some 30 miles upstream from the easternmost boundary of Grand Canyon National Park. The dam is the key structure for controlling deliveries of Colorado River water to the Lower Colorado River Basin States. Lake Powell, the reservoir created by Glen Canyon Dam, has a total storage capacity of 27,000,000 acre-feet. After the dam was closed and Lake Powell began storing water in March of 1963, it took seventeen years to fill the reservoir completely.

The primary purpose of Glen Canyon Dam as part of the larger CRSP system is to enable the States of Utah, Colorado, Wyoming, and New Mexico to utilize their apportionment of Colorado River water and meet their obligations for water delivery to the States of Arizona, California, and Nevada. Lake Powell and other CRSP reservoirs allow the Upper Basin States to take water year-round from the Upper Colorado River for consumptive uses and still store enough spring runoff in Lake Powell to guarantee the required compact deliveries to the Lower Basin States even during a long period of drought.

The operation of Glen Canyon Dam is controlled by the Bureau of Reclamation to meet project purposes. The major operational goals for Glen Canyon Dam are water storage and delivery to the Lower Colorado River Basin, consistent with the laws, treaties, compacts, and court decisions regarding Colorado River operations, collectively known as the "Law of the River".

Operation of Glen Canyon Dam has been established through a twofold procedure. First, the Secretary of the Interior annually determines volumes of water to be stored and released for international treaty and interstate compact purposes. Annual and monthly release volumes are based upon water supply considerations, water delivery requirements, and the avoidance of anticipated spills from Lake Powell ("spills" being releases in excess of powerplant capacity, which releases are referred to as "flood releases"). Annual and monthly reservoir operations are governed by, among other things, the Mexican Water Treaty, the Colorado River Compact, title VI of the Colorado River Basin Project Act of 1968 (hereafter "1968 Act") and the "Criteria for Coordinated Long-Range Operation of Colorao River Reservoirs" (hereafter "Coordinated, Long-Range Operating Criteria") promulgated pursuant thereto in 1970. These operational constraints take precedence over power operations (as is provided for by section 1 of the Colorado River Storage Project Act of 1956 (hereafter "1956 Act") and by section 602(c) of the 1968 Act, and over the vacating of reservoir space to reduce the probability of future flood releases, as provided by section 602(a)(3) of the 1968 Act. Second, within the constraints of monthly volumes of water to be released, hour-to-hour, daily, and weekly fluctuations in releases are made in accordance with hydroelectric power generation needs as determined by the Western Area Power Administration.

In the early 1980's, the Bureau of Reclamation began studies on the effects of Glen Canyon Dam on the downstream environment, including Grand Canyon National Park and Glen Canyon Dam on the downstream environment, including Grand Canyon National Recreation Area. The studies, called the Glen Canyon Environmental Studies (GCES), revealed that construction and operation of Glen Canyon Dam had produced a mix of positive and negative consequences for the Colorado River environment.

According to the GCES, construction of Glen Canyon Dam produced the following results:

> The reservoir behind the dam, Lake Powell, provides substantial water flows during late summer and fall when, without the dam, little or no water would be in the river. As a result, the white-water rafting industry now enjoys a longer season and higher revenues.
>
> A highly regarded trout fishery has developed below the dam, resulting from reduction and stabilization of water temperatures.
>
> The incidence of major flooding on the river has been reduced, allowing development of extensive new areas of riparian vegetation. That new vegetation, in turn, supports a significantly increased population of riparian birds.
>
> All sediment from upstream of the dam is now trapped in Lake Powell, drastically reducing the sediment load. Beaches, required for camping along the river, and important habitat areas, appear to be decreasing in area and volume.
>
> Decreased river temperatures have been detrimental to many native fish species. Of eight native species, only four remain in significant numbers. One, the humpback chub, is an endangered species.

Operation of Glen Canyon Dam was shown to produce adverse consequences for the Colorado River environment, Grand Canyon National Park, and the river's recreational users (rafters and fishermen). Specifically:

Flood releases from the dam erode beaches used by recreational rafters and campers. The river's now reduced sediment loads are inadequate to replenish beaches, even if flood releases occurred once every twenty years. Flood releases destroy riparian vegetation and birds.

Fluctuating releases from the dam, resulting from power peaking operations, cause the river to rise and fall as much as 13 feet twice a day. The fluctuations, which are most pronounced in the area immediately below the dam, strand fish, interfere with fish reproduction, erode beaches and interfere with rafting and fishing activities.

The GCES were not designed to evaluate options for remedial measures.

In response to substantial public concern over the findings of the GCES, the Department of the Interior announced on July 27, 1989, plans to examine Glen Canyon Dam operations under the National Environmental Policy Act through an environmental impact statement conducted by the Bureau of Reclamation in order to determine whether alternative operational schemes and other measures might be developed that better balance the benefits provided to water, power, and environmental interests. This title requires the Secretary to complete the final environmental impact statement not less than 3 years after the date of enactment.

As part of this process, the Commissioner of Reclamation announced that, on August 1, 1991, the Bureau would begin testing proposed interim flows at Glen Canyon Dam. The purpose of the test was to determine the suitability of the proposed interim flows, which would continue while the Bureau prepares appropriate NEPA documentation.

For the 90-day test, maximum flows from the dam were restricted to 20,000 cubic feet per second (cfs), with a minimum flow of 5,000 to 8,000 cfs. The upward ramp rate was limited to not more than 2,500 cfs each hour, or downward ramp rate to not more than 1,500 cfs each hour. In addition, maximum daily fluctuations were limited to 5,000–8,000 cfs, depending on the monthly volume of water to be released from the dam.

By letter dated August 15, 1991, the Director of the Upper Colorado Regional Office of the Bureau of Reclamation distributed a proposed set of exception criteria developed by the Bureau in cooperation with the Western Area Power Administration. On Monday, October 21, 1991, the Bureau signed an interagency agreement with WAPA implementing the proposed exception criteria. These exceptions to the operating criteria include: (1) an emergency operations exception, to cover a variety of situations ranging from Glen Canyon Dam generator failures to National Park Service-requested flow modifications for rescue purposes; (2) a regulation exception, to allow for not only hour-by-hour, but also second-by-second modification of powerplant output to respond to electrical demand changes; and, (3) an economic exception, to authorize WAPA to operate Glen Canyon Dam for up to 22 hours per month without the

constraints imposed by the interim flow criteria to avoid possible increased replacement power costs for WAPA's customers.

In November, 1991, the Secretary of the Interior announced interim flows for Glen Canyon Dam. The interim flow regime incorporates the proposed interim flows as well as the exception criteria set out in the Interagency Agreement. According to the Bureau, the interim flows will remain in effect until the Glen Canyon Dam Environmental Impact Statement is completed and final criteria for operation of the facility are approved and implemented.

While preparing the Glen Canyon environmental impact statement, and fulfilling the basic requirements of this title, the Secretary will be faced with the fundamental challenge of identifying and implementing a set of remedial measures which recreate and preserve the natural processes and values of the Colorado River below Glen Canyon Dam, while operating within the constraints of the most intensively regulated river in the world.

C. SECTION-BY-SECTION—TITLE XII

Section 1201 provides the short title, the Grand Canyon Protection Act of 1992.

Section 1202 directs the Secretary of the Interior to operate Glen Canyon Dam and exercise other authorities under existing law to protect, mitigate adverse impacts to, and improve the values for which Grand Canyon National Park and Glen Canyon National Recreation Area were established, including natural and cultural resources and visitor use. The Secretary's actions would be undertaken in accordance with the additional criteria and operating plans specified in Section 1204 and would be subject to and consistent with the Secretary's responsibilities to fulfill allocations of Colorado River water, as set forth in the various compacts, treaties, laws, and decrees which comprise the "Law of the River." The final sentence of this section makes clear the Committee's intention that this title in no way affect the Secretary's existing authorities and responsibilities with respect to Grand Canyon National Park and Glen Canyon National Recreation Area, nor in any manner affect statutory provisions governing management of these units of the National Park System, including the provisions of the Grand Canyon National Park Enlargement Act, Public Law 93-620. The intent of the second sentence of this section is not merely to provide a savings clause, but to establish that the Secretary's responsibilities for water storage, allocation, and delivery under the Law of the River are primary and control the Secretary's actions under this title.

The primary purpose of this title is to authorize changes in the operation of Glen Canyon Dam to prevent damage to downstream resources, principally the dam's power operations. The Committee recognizes, however, that other reasonable remedial measures may be available to the Secretary. The phrase "exercise other authorities under existing law" means that the Secretary should consider and may implement non-operational measures to address downstream effects of Glen Canyon Dam if such other remedial measures meet this title's goal of protecting, mitigating damage to, and improving the resources downstream of the dam.

The Committee has made it explicit that this legislation does not supplant the existing authority of the Secretary for either the Grand Canyon National Park or Glen Canyon National Recreation Area, and the Secretary is not to subordinate Park values solely to achieve operational changes at Glen Canyon Dam. The Committee does not intend the enactment of this title to in any manner suggest that the Park Service should be absolved from its responsibilities or suggest that a purpose for the existence of either Park unit is to support concession activities, such as recreational outfitting, or to encourage the introduction and enhancement of exotic species to the detriment of native species. The Committee understands that reregulation of Glen Canyon Dam may affect flow fluctuation, but that will not replace the loss of sediment. The Park Service has extensive experience elsewhere in beach stabilization and enhancement and the Committee expects the Secretary to fully use his "other authorities" to protect the values for which the parks were established.

Throughout this title and report, reference is made to changes in operation of Glen Canyon Dam. The Committee stresses that the primary focus of such changes will be with respect to the power operations of Glen Canyon Dam. This title is not intended to preclude changes in other operations of the dam, but the Committee wishes to emphasize that the water storage, allocation, and delivery requirements of the Law of the River place substantial limits on the Secretary's ability to change other elements of Glen Canyon Dam's operations.

Section 1203 addresses operation of Glen Canyon Dam between the time of enactment of this title and completion of the Secretary's Glen Canyon Dam Environmental Impact Statement ("EIS"). There is clear evidence that the adverse effects of current operations of Glen Canyon Dam are significant and can be at least partially remedied by interim operating procedures pending the completion of the EIS, the Glen Canyon Environmental Studies, and the adoption of new long-term operating procedures for Glen Canyon Dam.

Section 1203(c) provides that the Secretary may make adjustments to the interim operating criteria for the purpose of achieving the statutory goal pending the completion of the EIS. If monitoring demonstrates the need to adjust the interim criteria in order to better achieve the purposes set forth in section 1202, the Secretary may adjust the criteria, including, but not limited to, minimum flows, maximum flows, and the rate of change between minimum and maximum, consistent with section 1202, to further reduce adverse impacts on environmental, cultural, or recreational resources downstream from Glen Canyon Dam or respond to system emergencies.

Section 1204 directs the Secretary to complete the Glen Canyon Dam EIS within two years, and directs the Comptroller General of the United States to audit the costs and benefits of various alternative management policies and operational procedures identified in the EIS. The Committee urges the Secretary to assign the highest level of importance to the completion of the Glen Canyon Dam EIS. The Committee notes that nothing in this title is intended to limit in any manner the range of alternatives which may be developed

under the EIS process, nor to place a priority on any particular resource. The Committee recognizes the concern which certain interests have in future management decisions, but wishes to emphasize that the objective of this legislation is to protect, mitigate adverse impacts to, and enhance the values for which Grand Canyon National Park and Glen Canyon National Recreation Area were established, not to insulate particular users from the Secretary's range of discretion. The Committee intends that the Secretary consider all alternatives to protect park values and not focus exclusively on dam operations. The impact of increased visitation made possible by the Dam should be considered as well as control of exotics and nonoperational alternatives such as stabilization.

Additionally, further research and monitoring of the effect of the interim operating criteria instituted by the Secretary of the Interior may demonstrate that adjustments to the interim criteria are necessary to protect downstream resources or that nonoperational measures, if consistent with management of Grand Canyon National Park for the purposes for which it was established, may be more cost effective or may be required in any event due to loss of sediment load.

The Committee does not intend that this section interfere with the Secretary's preparation of annual operating plans under section 602(b) of the 1968 Act, which govern the operation of Glen Canyon Dam for the purpose of meeting water storage, allocation, and delivery requirements under the Law of the River. The Secretary's responsibilities in that regard are unaffected by this title, except as specified in the last sentence of section 1204(c), which requires the Secretary to consult with the Governors of the seven Colorado River Basin States and with the general public, including respresentatives of academic and scientific communities, environmental organizations, the recreational industry, and contractors for the purchase of Federal power produced at Glen Canyon Dam. Then, subject to and consistent with that annual operating plan and his responsibilities thereunder, the Secretary shall prepare an additional plan of operations for Glen Canyon Dam pursuant to this title. The Committee wished to emphasize that this section is not intended to affect any discretion or responsibilities the Secretary may have to consider downstream environmental impacts in connection with development of annual operating plans under section 602(b) of the 1968 Act. The public consultation required by this section is intended to assist the Secretary in exercising such discretion and fulfilling such responsibilities.

The Committee recognizes that annual operating plans promulgated under section 602(b) of the 1968 Act may need to be adjusted as actual flows and runoff forecasts change throughout the year. This may result in adjustments to the additional operating plan promulgated pursuant to this title. The Committee expects the Secretary to provide for appropriate consultation prior to making such adjustments, to the extent practicable.

Subsection 1204(d) requires the Secretary to submit to Congress the EIS, and a report describing the additional operating criteria and other remedial measures taken to protect downstream resources.

As a result of the revised operational goals contained in section 1202, the new long-term operating criteria for Glen Canyon Dam are expected to result in significant shifts in benefits among classes of project beneficiaries. For example, any operational changes that reduce the generation of peaking power in favor of baseload operations would greatly reduce the value of the power generation function. As the benefits of the project shift, the costs allocable to beneficiaries should shift, as well.

Section 1204(e) directs the Secretary of the Interior, after completion of the EIS and in consultation with the Secretary of Energy, to reallocate the costs of construction, operation, maintenance, replacement and emergency expenditures among the original purposes of the Glen Canyon Dam as set forth in the Colorado River Storage Project Act and the new purposes established in section 1202 of this title. The Committee intends that costs be allocated to all purposes which derive benefits from the dam, including water conservation and delivery, power generation, flood control, recreation, fish and wildlife and the new purposes identified in section 1202. The Committee also intends that the reimbursable costs for each purpose will be paid by the beneficiaries of that purpose. Costs allocated to section 1202 purposes will be nonreimbursable.

Section 1205 provides for a long-term monitoring and research program to determine the effects of Glen Canyon Dam operations and other measures taken by the Secretary pursuant to this title on the downstream resources of Grand Cayon National Park and Glen Canyon National Recreation Area. Under this long-term program, the Secretary is to develop necessary information to ensure that the protection standard set in section 1202 is met. The Committee intends that the Secretary shall, consistent with and subject to other legal obligations, including those related to storage, allocation, and delivery of Colorado River water, respond to information developed under the long-term monitoring program by adapting the operation of Glen Canyon Dam, and other measures taken under this title, as needed over time to protect the values for which Grand Canyon National Park and Glen Canyon National Recreation Area were established.

The Grand Canyon Protection Act requires the Secretary of the Interior to adopt both interim operating criteria (section 1203) and long-term operating criteria (section 1204). These interim and long-term operating criteria must be designed to achieve the overall statutory goal expressed in section 1202. Based on extensive testimony before the Committee and studies by the Bureau of Reclamation, it is the expectation of the Committee that the interim operating criteria, the EIS, and the long-term operating criteria will address releases from Glen Canyon Dam by adjusting fluctuating water releases and adjusting rates of flow changes, minimizing flood releases, maintaining sufficient minimum flow releases, and limiting maximum flow releases during normal operations, if needed, taking into account other non-operational measures as may be appropriate.

Section 1206 is a saving clause which expresses the Committee's intention that nothing in the title is intended to affect in any way the allocations of water secured to the Colorado River Basin States by the Law of the River. The Committee emphasizes the impor-

tance of this fundamental principle, which applies to and is meant to control the interpretation and application of every provision of this title. Section 1206 also assures that the provisions of this title do not affect any provision of Federal environmental law, including, but not limited to the Endangered Species Act, as amended, and National Environmental Policy Act.

Section 1207 recognizes that the costs of the Glen Canyon EIS, including the purchase of replacement energy necessitated by research flows, and the costs of the long-term monitoring program authorized under section 1205 of this title may be substantial and the benefits therefrom shared by the general public. Section 1207 provides that the Secretary shall consider the costs of such activities to be nonreimbursable. The Secretary is, however, authorized to use power revenues to pay such costs, but must first credit those revenues against CRSP power customers' repayment obligations. Under this section, increased power costs, if any which may follow implementation of the criteria promulgated under sections 1203 or 1204, and costs associated with the Glen Canyon Environmental Studies are reimbursable. Costs associated with the EIS are nonreimbursable.

Section 1208 authorizes appropriation of such sums as may be necessary to carry out the provisions of this title.

Section 1209 recognizes that adoption of long-term operational criteria for Glen Canyon Dam is likely to result in a significant loss of peaking generation from the resource. To compensate for that lost power, the Secretary of Energy and the Secretary of the Interior are directed to study and report to Congress on feasible sources of replacement power. During Senate hearings on this title, it was suggested that it may be possible to increase peaking generation at the Hoover Dam. Section 1209 specifically directs the Secretary to investigate that possibility as well as to investigate whether modifications or additions to the transmission system would be needed to acquire and delivery replacement power.

D. LEGISLATIVE HISTORY—TITLE XII

Title XII is similar to title X of H.R. 2567, which was approved by the Senate on October 26, 1990 and S. 144, introduced by Senator McCain on January 14, 1991.

XIII. TITLE—XIII IRRIGATION DRAINAGE DEMONSTRATION PROGRAM AND LAKE ANDES-WAGNER MARTY II PROJECTS, SOUTH DAKOTA

A. PURPOSE—TITLE XIII

This title would authorize a field demonstration program to study selenium contamination in agricultural drainage flows, and would grant conditional authorization for construction of the Lake Andes-Wagner/Marty II irrigation projects in South Dakota.

B. BACKGROUND AND NEED—TITLE XIII

1. Selenium control demonstration project

The Subcommittee on Water and Power held a hearing September 14, 1989, on S. 202, a bill to authorize construction of the Lake

Canyon and Glen Canyon; to the Committee on Energy and Natural Resources.

GRAND CANYON PROTECTION ACT

Mr. McCAIN. Mr. President, today, on behalf of myself, Senator DECONCINI and Senator BRADLEY I rise to introduce or, more accurately, to reintroduce the Grand Canyon Protection Act. This bill was passed by the Senate last year, and I had anticipated that it would become law at that time. While the bill enjoyed widespread support in Congress, regrettably, it fell victim to last minute politics and final passage could not be secured before the conclusion of the 101st Congress.

While I was disappointed that the bill was not enacted in the last Congress, I am privileged nonetheless to reintroduce this vital legislation and to work for its rapid approval in the 102d Congress.

Mr. President, this legislation seeks to remedy a critical environmental problem—a problem facing our Nation's most precious natural treasure—the Grand Canyon. The problem I refer to is the continued degradation of natural resources within the canyon due to current operational practices at Glen Canyon Dam—a structure located on the Colorado River, 30 miles upstream from Grand Canyon National Park.

In a report released in January 1988, the Department of the Interior determined that certain aspects of dam operations, particularly the irregular release of water to produce hydroelectric peaking power, have a substantial adverse impact on a variety of downstream environmental and recreational resources, including resources within Grand Canyon National Park. These impacts include the irreparable erosion of Colorado River beaches, the impairment of habitat for endangered fish species, and ill effects on recreational fishing and white water river rafting.

The question of whether we should act to protect the crown jewel of our National Park System is beyond debate. The answer is unequivocally yes. The question is how do we accomplish our aims? The Grand Canyon Protection Act contains the answer. It provides the means to remedy these adverse impacts, and to preserve the park's resources for the enjoyment of this and future generations. First, the bill requires the Secretary of the Interior, as manager of the dam, to operate the dam in a manner that protects the natural resources of the Grand Canyon.

Second, the bill provides for the timely completion of an environmental impact statement on the dam operations. This study will provide the Secretary with the scientific date he needs to make responsible operational decisions and to fulfill his duty to protect the canyon.

Third, because the EIS process is expected to take up to 2 more years to complete, the bill calls on the Secretary to implement protective interim flows to mitigate adverse environmental impacts while the search for long term solutions is underway. Finally, the bill requires the Secretary to develop and implement a long-term monitoring program to ensure we continue to meet our stewardship responsibilities in the future.

I've explained in general terms what the legislation does, now let me explain in greater depth why I believe it's necessary.

Mr. President, I know many of my colleagues have been to the Grand Canyon and appreciate what a special place it is. I will refrain from trying to describe its inspiring beauty and its timeless significance as the crown jewel of our Nation's natural heritage. Frankly, I've found such an endeavor an impossible task. I doubt whether there are words in the English language to capture its true essence. Anyone who has beheld a sunrise at Navajo Point, hiked the backcountry on the Tanner Trail or run the rapids at Lava Falls understands the frustration of trying to describe the indescribable, so I shall not try.

Suffice it to say the Grand Canyon is a unique and irreplaceable gift which we have a moral duty to preserve, protect and to hold in trust for our children. That duty is why this legislation is necessary.

The impact of Glen Canyon Dam on the Grand Canyon has been the focus of enormous attention over the past several years. Constructed in 1963, the dam is a major component of the Colorado River storage project. The structure impounds water critical to meeting the needs of the Colorado River Basin States. It provides flood control, generates clean and economical hydroelectricity and offers recreational opportunities to millions of Americans every year. This multipurpose facility provides many benefits, but the impacts of the operating regimen we have established risk a priceless part of our natural heritage. We are just now beginning to truly appreciate and properly address those impacts.

What exactly are these costs? Eight years ago, when concern about the impact of dam operations on the canyon was first raised, then Secretary of the Interior, James Watt initiated the Glen Canyon environmental studies to analyze and quantify the extent of the problem. Phase I of the studies was concluded in 1988. The study indicates that power operations at the dam are, indeed, having a substantial adverse impact on three important downstream Colorado River resources: beaches, endangered fish, and recreation.

I would like to briefly describe, in general terms, the correlation between dam operations and the degradation identified by the Department of the Interior. For those interested in a more detailed scientific analysis, I would recommend reading the reports published by the Department on phase 1 of the Glen Canyon environmental studies.

First, let's address the beaches. The Glen Canyon environmental studies found that widely fluctuating water releases from the dam, primarily for the maximum generation of hydroelectric peaking power, are contributing to the erosion of river beaches. It's critical to recognize that river beaches are not merely convenient resting spots for river rafters, hikers, and Grand Canyon campers. The beaches are extremely valuable biological resources which support riparian vegetation and diverse forms of wildlife. They are precious and fragile ecosystems which are as vital a part of the canyon as a view from the South Rim and just as deserving of protection.

Some maintain that there is no problem with beach erosion. They assert that the river beaches are actually better off because of the dam. They cite the fact that, historically, predam flood flows raging down the river would, occasionally, scour the canyon leaving little in their wake, and that taming the river has put an end to such events. There is no doubt that certain flood flows inflicted enormous damage on beaches and drastically reduced their size and number. No responsible student of the river would suggest otherwise.

It must be pointed out, however, that before the dam was constructed, sediment was permitted to flow down the Colorado River unimpeded. That sediment would typically collect forming new beaches, enabling the river to repair itself naturally as it had over the millenia.

The conditions today, however, are different. The dam restricts sediment transport and seriously reduces the building blocks necessary for beach formation. Without the natural transportation of sediment, the widely fluctuating flows from Glen Canyon Dam along with very high water flows are gradually and irreversibly eroding canyon beaches. I'm sure most of my colleagues would agree, we simply cannot sit idly by and watch a vital part of the Grand Canyon environment wash away into oblivion.

Another resource affected by dam operations is native fish species, including the endangered humpback chub. Postdam changes in water temperature and fluctuating releases have changed the environment in which these species are expected to survive. The exact impact of current operations and the potential benefits of operational changes will continue to be examined during the environmental impact statement currently underway. Clearly, we have an obligation to assist these species in their fight for survival. If changes in dam operations can promote their recovery, as suggested by the Glen Canyon studies, then we must do what we can to assist.

Finally, we must consider the impact of dam operations on recreation—in-

cluding river rafting and the world-class trout fishery at Lee's Ferry. There is no doubt that without the dam there would be no trout fishery, and Glen Canyon Dam has had some positive effects on white water boating including extending the boating season. Those factors should not mean, however, that these recreational activities should receive second rate status, nor does it mean that we should disregard opportunities to improve the conditions of these resources as dam operations are developed.

According to the GCES final report, fluctuating releases during the winter months reduce the natural reproduction of trout by exposing spawning beds and denying access of reproducing adults to tributaries. Furthermore, fluctuations and low minimum flows have an adverse impact on river rafting. Operational changes can be made to improve these recreational resources, and it's time they receive the consideration they deserve in the decisionmaking process.

While, in sum, the impact of current Glen Canyon Dam operations on the canyon is generally bad news, the good news is that the dam can be operated in a manner which will better protect the environmental and recreational resources of the Grand Canyon. Exactly how that will be accomplished is up to the dictates of science and the findings of the environmental impact statement.

With an EIS underway some might wonder why legislation is necessary. I, along with Senator DECONCINI, wrote to the Secretary urging him to order the environmental impact statement, and subsequently we called on the Secretary to implement protective interim flows. I support the Secretary's decision to pursue those important courses of action. The Grand Canyon Protection Act, however, is necessary because its enactment will place us irreversibly on the road to making lasting and critical decisions on how the Grand Canyon fits into Glen Canyon Dam operations. Statutorily defining our standards will leave no doubt, now and in the future, about the Secretary's responsibility to protect the natural resources of the Grand Canyon and the will of Congress in that regard.

The environmental impact statement is obviously a critical undertaking. Whether we can successfully turn our good intentions into meaningful and measurable benefits to the canyon environment depends upon the quality of the EIS. That's why I hope that as hearings are conducted on the Grand Canyon Protection Act, we will have the opportunity to review the progress and status of the environmental impact statements being prepared by the Department of the Interior, and the western area power authority. An oversight hearing on the process would prove very informative and useful to all concerned.

Let there be no mistake, Glen Canyon Dam has provided and will continue to provide many benefits—clean and dependable energy to help power the region's tribal, municipal and industrial growth, water for people to survive and for our crops to grow, and recreational opportunities for millions. The mighty Colorado and the Glen Canyon Dam have provided us with very special gifts indeed—supporting a wide array of interests and uses. This legislation does not suggest that we forego these benefits. In fact, the bill states categorically that the dam's water storage and delivery functions shall not be disrupted.

This legislation merely ensures that we put our priorities back into perspective. It will see that we don't allow our constructive use of one important resource to become an abuse of another—particularly the Grand Canyon.

Mr. President, I want to clearly state that I understand the importance of affordable electrical power to our economy and to the welfare of our people. I'm confident that we can find viable and cost-effective alternatives for any peaking power potential which might be lost from Glen Canyon Dam. I urge the Secretary of the Interior and the Secretary of Energy to work together and with power developers and users in the region to help identify and develop those alternatives.

I'd like to note that the legislation now before the Senate is somewhat different than the bill I originally introduced along with Senators DECONCINI and BRADLEY last year. Following the introduction of that bill, we heard from a variety of individuals and groups who expressed concerns and suggested improvements to the legislation. In response, last August, I convened a meeting in my Phoenix office with representatives of the various parties including environmental organizations, and represenatives of public power and water interests.

At the meeting all parties had the opportunity to express their views about the bill. Many valid points were made and I asked these groups to work together to achieve a consensus which would ensure the highest standards of protection for the Grand Canyon Trust, the Sierra Club, the Colorado River Energy Distributors Association, the American Public Power Association, and water represenatives from the Upper and Lower Basin, met that very formidable challenge. Together they worked out an agreement which, as I said, was approved by the Energy Committee and passed by the Senate last year.

Their task was not any easy one. Many diverse and sometimes contradictory interests were at stake. But through cooperation and commitment, they succeeded. Those who participated deserve our gratitude and congratulations. As I said, the bill upholds the highest standards of canyon protection, but ensures that decisions on how to accomplish that end will be made in a manner which is equitable and fair.

My colleagues will notice that the bill I'm introducing today does delete one provision of the legislation as passed by the Senate during the last Congress. This provision was added last year as an amendment during the Energy Committee markup. It tells the Department of the Interior how to finance the Glen Canyon Dam scientific studies and the power revenues lost due to the changes in dam operations required by the law. The question of who pays for environmental impact statements and the economic impacts of conducting them is a policy question with far reaching implications well beyond the scope of this legislation. The administration expressed its strong opposition to the financing provision saying that "it violates long standing congressional and executive branch policy."

Selectively altering current administrative procedures in this one case is neither appropriate nor is it fair and doing so could imperil passage of the legislation. The generally applied policies should apply in this case. Any deficiencies or inequities which may exist in those policies would be better redressed administratively or legislatively in a manner that will apply to all cases of this nature, rather than micromanaging the financing question in the Grand Canyon Protection Act. With that one exception, the bill we introduce today is identical to the bill which the Senate passed unanimously last year.

Before leaving the topic of financing, I would like to say that I believe fairness and equity should be observed in allocating costs for environmental impact statements. We should strive to distribute the costs as fairly as possible among all the project purposes and beneficiaries rather than singling out any one group to solely bear the burden.

In conclusion, I would like to recall the words of Theodore Roosevelt, one of the first and most dedicated supporters of the Grand Canyon. It was almost 90 years ago, that President Roosevelt stood at the edge of the Grand Canyon and marvelled at the magnificance he beheld. Moved by its grandeur, the President admonished those assembled. He said:

> Leave the Canyon as it is. You cannot improve on it the ages have been at work on it, and man can only mar it. What you can do is to keep it for your children, your children's children, and for all who come after you.

Those simple words define the responsibility with which we—the present day stewards of the Grand Canyon—have been vested. Passage of this legislation will enable us to fulfill that responsibility faithfully. Let us do so with resolve and dispatch.

I ask unanimous consent that the bill and letters of support for the Grand Canyon Protection Act be

1 of 100 DOCUMENTS

CONGRESSIONAL RECORD -- SENATE

102nd Congress, 2nd Session

138 Cong Rec S 17831

THE GRAND CANYON PROTECTION ACT

October 8, 1992

REFERENCE: Vol. 138, No. 144

SECTION: Senate

SPEAKER: Mr. McCAIN; Mr. BRADLEY

TEXT:

Mr. McCAIN. I want to thank Senator Bradley for his tireless efforts on behalf of the Grand Canyon Protection Act and your work to pass this measure. I want to review briefly our goals in enacting this landmark legislation.

First, we want to ensure that operations of Glen Canyon Dam will stop damaging the downstream resources in Glen Canyon National Recreation Area and Grand Canyon National Park. We want to give the Secretary of the Interior a clear and unequivocal mandate to operate Glen Canyon Dam in a manner that protects, mitigates damage to, and improves downstream resources. We require the timely completion of an environmental impact statement to provide the scientific information that the Secretary needs to achieve that goal.

Second, pending completion of the environmental impact statement and implementation of long-term operating criteria to meet the new protective standard established in the act, we want the Secretary of the Interior to halt the adverse impacts of Glen Canyon Dam operations. Last year, Secretary Lujan directed the Bureau of Reclamation to institute interim operating criteria until the agency completes an environmental impact statement on dam operations. We commend Secretary Lujan for that action. The Grand Canyon Protection Act essentially ratifies the Secretary's decision on interim flows and ensures that those operating criteria will remain in effect until the EIS, and final criteria, and operating plans are completed, unless further action by the Secretary is necessary to protect downstream resources.

Third, we want the manner in which Glen Canyon Dam is operated to be determined in an open and public process in which all of the many parties and interests that use, benefit, and enjoy the Colorado River in Glen Canyon National Recreation Area and Grand Canyon National Park will have an opportunity to participate. We think that the process

provided for in the National Environmental Policy Act is ideally suited for determining how Glen Canyon Dam is operated. The Secretary should study and develop a range of alternatives for achieving the goal of protecting, mitigating damage to, and improving the condition of downstream resources. We also want this process to be informed by the best scientific and economic information on the environment of the Colorado River downstream from the dam, the impact of Glen Canyon Dam operations on that environment, and all of the economic and environmental costs and benefits of changing Glen Canyon Dam operations.

Fourth, we want the Department of the Interior to develop and implement a long-term monitoring program to provide information on the effect of Glen Canyon Dam operations on the downstream environment. We recognize the complex scientific and economic questions that the Federal and State resource management agencies must address in determining how Glen Canyon Dam is operated. We recognize that the environment downstream from the dam is a dynamic system. Only a program of adaptive management will serve the Grand Canyon, the wildlife, the endangered species, the native American tribes and their cultural heritage, and the recreational, water, and power users of the Colorado River. As more scientific information becomes available, the Department of the Interior may need to reevaluate the operating criteria and procedures for the dam to meet the goals and purposes of the Grand Canyon Protection Act.

Finally, we intend to ensure that the fundamental institutional arrangements for apportioning the waters of the Colorado River between the Upper Basin States and the Lower Basin States-as those arrangements have been set forth in interstate compacts, international treaties, court decisions, and laws implementing the compacts and treaties-are not affected by this legislation. Those fundamental arrangements remain fully intact under the Grand Canyon Protection Act.

Mr. BRADLEY. I appreciate the Senator's comments on the goals of this legislation, and thank him for his leadership and persistence in securing passage of the Grand Canyon Protection Act. He has clearly stated the purposes and intent of the Act.

Mr. McCAIN. I would like to additionally pose a question to the Senator from New Jersey about the priorities among the different uses of the Colorado River and Glen Canyon Dam. As I understand it, Secretary Lujan directed the Bureau of Reclamation in July, 1991, to prepare an environmental impact statement on Glen Canyon Dam operations. The Secretary is to be commended for that action. However, the Secretary's decision with respect to interim flows and the Glen Canyon Dam EIS does not in any way lessen the need for the Grand Canyon Protection Act. Rather, the act provides the Secretary with a clearly defined legal context to prepare the EIS. The Grand Canyon Protection Act unequivocally provides that protection of the downstream resources in the Grand Canyon occupies a position of the highest priority in determining how the dam is operated, subject to and consistent with the Colorado River compact and the laws and treaties implementing the compact. There has been a long controversy over the priority of uses and values of the Colorado River and Glen Canyon Dam. The Western Area Power Administration has asserted that power generation has complete primacy over all other uses and values. Is it the Senator's understanding that the Grand Canyon Protection Act rejects the policy that power generation has any priority or primacy over protection of downstream environmental, recreation, or cultural values?

Mr. BRADLEY. Yes. The Grand Canyon Protection Act is intended to require the Secretary of the Interior to adopt operating criteria that will address, without infringing upon or affecting the Colorado River compact, the adverse impacts caused by both fluctuating flows and uncontrolled flood releases. Under the Grand Canyon Protection Act, all aspects of Glen Canyon Dam operations should be governed by the goal of protecting the downstream resources so long as those operations do not interfere with the allocation, apportionment, and deliveries provided for in the Colorado River compact.

Mr. McCAIN. I thank the Senator for his confirmation. I would reiterate and emphasize that, while the Grand Canyon Protection Act does not change the fundamental purposes of Glen Canyon Dam, the act directs the Secretary to operate the dam to protect downstream resources.

I want to add one further comment. The Grand Canyon Protection Act requires a review by the Comptroller General of the "costs and benefits to water and power users and to the natural, recreational, and cultural resources ***" of the implementation of this legislation. It is important that this audit or study be a full economic analysis, rather than simply a financial analysis of the cost to the users of project power. In order to make the most responsible operating decisions, we must obtain a comprehensive view of the cost of this legislation. Does the distinguished chairman of the Water and Power Subcommittee intend that such a comprehensive audit take place?

Mr. BRADLEY. Yes, We intend that the audit be conducted under the Water Resource Council's 1983 "Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies," which require a full analysis of environmental and economic costs and benefits.

LOAD-DATE: August 24, 2009