

THE WHITE HOUSE  
WASHINGTON

May 23, 1977

MEMORANDUM FOR

THE SECRETARY OF THE INTERIOR  
THE SECRETARY OF AGRICULTURE  
THE SECRETARY OF DEFENSE  
THE CHAIRMAN OF THE TENNESSEE VALLEY AUTHORITY

In my Environmental Message of May 23, 1977, I made a commitment to hasten the implementation of the Endangered Species Act of 1973.

The Federal Government should provide leadership in identifying and protecting the habitat which is critical for the survival and recovery of those species which have been determined to be endangered or threatened under the Act. Federal programs should be coordinated in a way that will provide timely assistance to the Secretary of the Interior and Secretary of Commerce in determining the habitat which is critical for the survival and recovery of those endangered and threatened species.

I therefore direct that you:

(a) identify, to the extent feasible, in consultation with the Secretary of the Interior and/or the Secretary of Commerce, areas on lands under your jurisdiction or control which appear to you to be critical for the survival and recovery of species presently determined to be endangered or threatened under the Act;

(b) provide the Secretary of the Interior and/or the Secretary of Commerce with the data and information available to you concerning the areas identified by you under subparagraph (a) to assist them in determining whether or not the areas identified by you constitute critical habitat under the Act;

(c) exercise caution in the modification of any area identified by you under subparagraph (a) and consult with the Secretary of the Interior and/or the Secretary of Commerce concerning any proposed modifications until the appropriate Secretary determines whether the area constitutes the critical habitat of an endangered or threatened species under the Act;

(d) encourage States and private citizens to assist you in identifying areas on lands within your jurisdiction or control which appear to be critical for the survival and recovery of endangered and threatened species.

I also direct the Secretary of the Interior and the Secretary of Commerce to:

(a) develop timetables for implementation of this request to assure that the information is compiled within the shortest possible time;

(b) provide the necessary guidance and cooperation to assure efficient compliance; and

(c) expedite their determinations of critical habitat of endangered and threatened species under this Act.

*Jimmy Carter*

ational Environmental Policy Act (42 U.S.C. 4321 et seq.). The satisfaction of the requirements of these other statutes, however, does not of itself relieve a Federal agency of its obligation to comply with the consultation procedures set forth in this part.

(b) When particular programs or activities involve more than one Federal agency, these agencies may, with concurrence of the Director, fulfill their consultation responsibilities through a single agency.

#### § 223.13 Assistance from the Service.

It is the primary responsibility of each Federal agency requesting consultation to conduct appropriate studies and to provide the biological information necessary for adequate review of the effect an activity or program has upon listed species or their habitat. To the extent it is able, the NMFS will upon request provide relevant available data and reports, personnel, and recommendations for additional studies or surveys, but the NMFS will not fund any such additional studies or surveys.

#### § 223.14 Assistance from other sources.

Federal agencies may seek assistance from any source to obtain the biological information necessary for review of the effect an activity or program has upon listed species or their habitat. Such assistance may include, but it not limited to that obtained by contract or required by regulations of the Federal agency. However, responsibility for compliance with the procedures of this subpart remains with the Federal agency and cannot be delegated by it.

#### § 223.15 Threshold examination.

Upon receipt of a request for consultation, the Director or Regional Director will conduct a threshold examination of the activity or program under review. A threshold examination may include a review of available information or an on-site inspection of the area.

(a) If an activity or program under review will, in the opinion of the Director, promote the conservation of listed species, the appropriate Federal agency shall be notified in writing within 60 days after consultation is initiated, and additional section 7 consultation shall be unnecessary unless it would further benefit the listed species. The NMFS, to the extent feasible, will assist in carrying out such programs if requested by the Federal agency. The Federal agency should be aware that in addition to satisfaction of section 7 requirements, a permit may be required for activities otherwise prohibited by section 9 of the Act (16 U.S.C. 1538).

(b) If an identified activity or program is not specifically for the conservation of listed species, but the Director or Regional Director concludes from the

threshold examination that in no likelihood will the activity or program jeopardize the continued existence of a listed species or result in the destruction or adverse modification of its critical habitat, the appropriate Federal agency shall be notified in writing within 60 days of initiation and further section 7 consultation shall be unnecessary.

#### § 223.16 Further consultation.

If an identified activity or program is not specifically for the conservation of listed species, and the Director or Regional Director concludes as a result of the threshold examination that the activity or program may jeopardize the continued existence of a listed species or result in the destruction or adverse modification of its critical habitat, the Federal agency will be so notified in writing within 60 day of initiation. The Federal agency, with assistance as feasible from the NMFS and other sources of expertise, shall then initiate biological surveys or studies to determine how the activity or program may affect listed species or their critical habitat. Within 60 days of receipt of adequate information and documentation, unless special circumstances require negotiation of a longer period, the NMFS will end consultation by issuing a biological opinion.

#### § 223.17 Biological opinions.

(a) If the Director or Regional Director concludes that an activity or program under review is not likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of critical habitat, he will so notify the Federal agency in writing.

(b) If the Director or Regional Director concludes that an activity or program under review is likely to jeopardize the continued existence of a listed species or result in the destruction or modification of critical habitat, he will so notify the Federal agency in writing and may recommend any changes that in his opinion will eliminate these effects of the activities or programs.

(c) Biological opinions issued pursuant to paragraphs (a) and (b) of this section will be accompanied by a statement of the facts and documentation on which they are based.

(d) Upon receipt and consideration of the final biological opinion and recommendations of the NMFS, it is the responsibility of the Federal agency to determine whether to proceed with the activity or program as planned, in light of its section-7 obligations. Where the consultation process has been consolidated with interagency cooperation required by other statutes, such as the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) or the National Environmental Policy Act (42 U.S.C. 4321 et seq.), the final biological opinion and recommendations of the NMFS should be

stated in the documents required by those statutes.

#### § 223.18 Reinitiation.

Consultation shall be reinitiated by the NMFS or by the Federal agency:

(a) If new information reveals impacts of an activity or program that may hinder the survival and recovery of listed species;

(b) If the activity or program is modified in a manner that may hinder the survival and recovery of listed species; or

(c) If a new species is listed that may be affected by the activity or program.

#### Subpart C—Determination of Critical Habitat

#### § 223.21 Procedure.

Whenever deemed necessary and appropriate, the Director shall determine critical habitat for a listed species. After exchange of biological information, as appropriate, with the affected States and Federal agencies with jurisdiction over the lands or waters under consideration, the Director shall publish proposed rulemakings in the FEDERAL REGISTER. Comments of the scientific community and other interested persons will also be considered in promulgating final rulemaking.

#### § 223.22 Criteria.

The Director will consider the physiological, behavioral, ecological, and evolutionary requirements for the survival and recovery of listed species in determining what areas or parts of habitat (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of the species) are critical. These requirements include, but are not limited to:

(a) Space for individual and population growth and for normal behavior;

(b) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(c) Cover or shelter;

(d) Sites for breeding, reproduction, or rearing of offspring; and generally,

(e) Ecosystems that are protected from disturbances and are representative of the geographical distribution of listed species.

#### § 223.23 Emergency determination.

Sections 223.21 and 223.22 notwithstanding, the Director may make an emergency determination of critical habitat if he finds that an impending action poses a significant risk to the well-being of a listed species by the destruction or adverse modification of its habitat. Emergency determinations will be published in the FEDERAL REGISTER and will remain in effect for no more than 120 days.

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