タイトル	HONORING THE LIFE AND SPIRIT OF THE PACIFIC SALMON (3) : Legal Systems to Protect Salmon in the United States and Japan
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引用	北海学園大学法学研究, 41(3): 660-607
発行日	2005-12-31

HONORING THE LIFE AND SPIRIT OF THE PACIFIC SALMON (3): Legal Systems to Protect Salmon in the United States and Japan

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3. Regulation of Pollution

(1) The United States

In 1948, Congress made the first attempt to control water pollution on a national scale. The Federal Water Pollution Act[153] gave the state governments the primary authority to regulate water quality of interstate or navigable water since at that time the environmental pollution issues were considered to be mainly in the domain of state governments.[154] At that time, the federal government's duty was limited to several fields such as water quality investigation and financial aid for the construction of necessary treatment works.[155]

Beginning the latter half of the 1950s, the public became more concerned with environmental pollution issues and appealed to the federal government to take nation-wide effective countermeasures for them. Congress responded to the voice of the public with the enactments of some basic environmental statutes: the Air Pollution Control Act,[156] the National Environmental Policy Act,[157] etc. Furthermore, the Environmental Protection Agency (EPA) was created by the Executive Reorganization Plans Nos. 3 and 4 in 1970.[158] Going with the times, the Federal Water Pollution Control Act received drastic reform in the 1970s. Several amendments established a system of standards, permits, and enforcement. The Federal Water Pollution Control Act of 1977 is commonly known as the Clean Water Act.[159]

The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[160] Pollutant sources are roughly divided into three types: point sources,[161] non-point sources,[162] and non-draining activities such as dredging and filling earth gravel and sand.

The nation-wide standardized effluent limitations are necessary in order to regulate pollutants from all point sources. The Environment Protection Agency set up strict effluent limitations for each of fifty-two industrial categories and four-hundred-and-eighty sub-

categories. The Environmental Protection Agency divides the pollutants into three categories: (a) conventional pollutants designated by the Environmental Protection Agency; (b) toxic pollutants including an initial list of 129 specific chemicals; (c) non-conventional pollutants which are not designated either conventional pollutants or toxic pollutants. Different levels of technology are to be adopted for those three categories. The "best conventional technology (BCT)" is to be adopted for the conventional pollutants, the "best available technology economically achievable (BAT)" is to be adopted for toxic pollutants and non-conventional pollutants. Basically, effluent limitations for all point sources except publicly owned treatment works are required to reflect "best practicable control technology currently available (BPT)". And the "best available demonstrated technology (BADT)" is to be adopted for newly found point sources.

The water quality standards are to be set by each state with the purpose of keeping the water quality of public drinking water, agricultural and industrial water in good condition, to protect fish and wildlife, and to protect leisure activities. A watershed is divided into areas and water quality standards are set for each area. Each state maps out the water quality standard plan in accordance with the criteria set by the Environmental Protection Agency, then formally introduces it after the Environmental Protection Agency recognized the plan.

A permit is necessary to discharge pollution into navigable waters. It is called the National Pollutant Discharge Elimination System (NPDES). The discharge permits can be issued by the Environmental Protection Agency or by states with programs approved by Environmental Protection Agency.[163]

The state must calculate the acceptable total maximum daily amount or load (TMDLs) of pollutants in the cases where the water quality standard is not being met, even though the effluent limitation may have been met (or that there is a possibility to occur such situation). The acceptable total amount of pollutants will be assigned to each pollutant source which drains into the particular water

area after subtracting the contribution of non-point sources.

The 1987 Amendments of the Clean Water Act added a new provision to deal with the pollutants discharged from non-point sources such as roads, parking lots, lawn, agricultural and stock farms, and urban areas. States are required to identify water bodies in which water quality standards cannot be met without controlling non-point source pollutants, and to establish management programs for these water bodies, including "best management practices" for categories of sources.

The Clean Water Act has been one of the most successful environmental statutes in the United States. In particular, strict regulation of individual discharges has been very successful in controlling pollution. The progress has been much slower for erosion and other forms of pollution from non-point sources, such as farm fields and lawns. Nonetheless, since the early 1970s, most American rivers have been cleaned up on the whole. The Clean Water Act contributes much towards keeping habitat healthy for salmon.

(2) Japan

The first pollution control acts in Japan were the Water Quality Conservation Act and the Factory Effluent Control Act. These Acts were enacted in 1958 in order to apply drainage standards to public waters, require factory owners to report the establishment of drainage facilities to the competent authority, and control factory drainage. In 1970, the Water Pollution Control Act was enacted to prevent pollution of public water areas and underground water and deal with the problems of water pollution.[164] The 1958 Acts were repealed in 1971. The Water Pollution Control Act is applicable to all the drainage from "specified facilities" to public water areas.[165] Factory owners must report plans or plan amendments for drainage facilities to a prefectural governor before he or she establishes a specified facility.[166] The prefectural governor, within sixty days

after he or she receives the report, can request a factory owner to change the structure or the use of the specific facility or the plan for the treatment of the polluted water, or to abandon the plan for establishing the specified facility if he or she recognizes that the specified facility may violate the drainage standards.[167]

There are two kinds of standards to keep water quality in adequate condition: Water Quality Standards and Effluent Standards. The Water Quality Standard is the ideal standard to protect people's health and to conserve the living environment.[168] It is one of the national environmental quality standards determined by the National Government in accordance with the Environmental Basic Act of 1993.[169] Since the Water Quality Standard is just regarded as a goal of administrative activities, the Water Pollution Control Act has no penalty for its violation.[170] The water quality that fails to meet the Water Quality Standard is considered "polluted water."

The second standard is the Effluent Standard determined by the national government or prefectural ordinances in accordance with the Water Pollution Control Act.[171] First, the nationwide Effluent Standard is established by an Ordinance of the Prime Minister's Office. The prefectural ordinances can provide their own more stringent Effluent Standards and can establish their own Effluent Standards for a pollutant that is not controlled by the national government. The prefectural ordinances can also apply such Effluent Standards to a facility that is not designated by the national government's ordinance as the specified facility.[172] The Water Pollution Control Act provides the total amount of drainage control for the specific wide and closed water areas into which a large quantity of organic and industrial drainage flows and there is a possibility that the quality of water will fail to meet the Water Quality Standard.[173]

The Water Pollution Control Act plays an important role in keeping the public water areas from being badly polluted. However, unlike the United States' statute, the Water Pollution Control Act merely considers human health, and it has no provision to keep the

water quality healthy in order to protect aquatic wildlife such as salmon.

In Japan, one of the reasons for serious water pollution that is harmful to aquatic wildlife is said to be the accumulated pollution in riverbeds and the sea bottom. However, the Water Pollution Control Act does not cover the pollution in riverbeds and the sea bottom because it is only applicable to the water over them. (The Clean Water Act in the United States also seems to have no direct control over sediment.) The Water Pollution Control Act should be amended with provisions to keep the whole watershed environment healthy.

4. Regulation of Salmon Harvest

(1) The United States

During the nineteenth century, the harvesting of Pacific Salmon went unregulated — it was a free-for-all era that drastically reduced the runs. Gradually, the states of Washington and Oregon placed increasingly more rigorous limits on salmon fishers.[174] After World War II, as economic activity increased and population grew, it became apparent that states alone could not adequately regulate salmon harvest. The native ranges of the runs of Pacific Salmon are thousands of miles, far beyond the two states' jurisdictions. The same is true of the many Indian tribes that have regulatory authority under their treaties, as construed by courts in the 1970s.[175]

Today, regulation of the Pacific Salmon harvest is exceedingly complex, a web of federal statutes, international treaties, and state and tribal laws. One study concluded that a Chinook salmon born in Idaho's Lochsa River, in its life journey up to the Gulf of Alaska and back to the Lochsa, would pass through a total of seventeen federal, international, state, and tribal jurisdictions.[176]

In 1976, Congress passed the Magnuson-Stevens Fishery Conservation and Management Act, also called the Magnuson Act, that claimed exclusive federal regulatory authority over the ocean fishery

from the three-mile-limit out to the 200-mile-limit, a 197-mile-wide zone.[177] Harvest regulations in the Northwest are done by two agencies created by the Act, the North Pacific Fishery Management Council (reaching up to Alaska) and the much more southerly Pacific Fishery Management Council.[178] Two major international treaties —the 1985 United States－Canada Treaty[179] and the 1992 United States－Japan－Russia－Canada Treaty —also attempted to bring order to the ocean harvest. The states[180] and tribes[181] also regulate the ocean inside the three-mile-limit and in rivers.

If there is one principle guiding this far-flung regulatory matrix, it is sustainability, the idea that the harvest of every run of Pacific Salmon should be regulated so that enough fish to will return to the spawning grounds to perpetuate the runs.

(2) Japan

a. Commercial Fishing

The commercial fishing of salmon is mainly observed within two hundred nautical miles of Hokkaido Island and the Tohoku district, and within two hundred nautical miles of Russia. In general, the prefectural governors manage salmon fishing with fixed-nets at the coast, and the Minister of Agriculture, Forestry, and Fisheries manages salmon fishing with drift nets off shore. According to the Fishing Act of 1949 described below, there are three bases for catching salmon commercially: fishing rights, entrance rights to a fishing ground, and fishing permission.[182]

The Fishing Act of 1949 provides the basic system regarding fishing in the public water areas.[183] The Fishing Act provides for fishing rights and entrance rights to fishing grounds in coastal waters. Everyone who wants to fish with fixed-nets, in subdivisions, or in cooperation with other people, must have one of these rights.[184] A fishing right provides the right to fish exclusively in a certain water area. Fishing rights are established based on a license to fish

issued by a prefectural governor.[185] As for the inland fishing such as in a river, lake, marsh or swamp, a prefectural governor issues a license to fish only to fishermen's cooperative associations that propagate aquatic animals and plants.[186] The term of existence for fishing rights is five or ten years from the date of issue of the license.[187]

Entrance rights to a fishing ground provide the right to fish a fishing ground in coastal waters that belong to joint fishing rights or certain division fishing rights of other people.[188] The membership of a fishermen's cooperative association or a fishermen's cooperative association alliance must be given entrance rights to a fishing ground.[189]

Another way to catch salmon commercially is to get fishing permission from a prefectural governor or the Minister of Agriculture, Forestry, and Fisheries. This permission applies only to the areas from the coasts out to the two hundred nautical mile limit and within two hundred nautical miles from Russia. A prefectural governor is authorized to issue permission for fishing with small-size draft nets.[190] The Minister of Agriculture, Forestry, and Fisheries is authorized to issue permission for large-scale fishing with such as medium-size drift nets or a mother ship.[191]

As to fixed-net fishing, there are some regulations regarding fishing seasons, terms, and water areas. The Fishing Act of 1949 provides the Fishing Adjustment System to maintain an order in fishing grounds, to promote for well-organized use of water areas, and to increase fishing productivity. In order to achieve these purposes, the Minister of Agriculture, Forestry, and Fisheries and the prefectural governors are authorized to regulate the number of fishermen, fishing grounds, fishing boats, fishing implements, and fishing method.[192] The Marine Resources Protection Act of 1951 provides the Minister of Agriculture, Forestry, and Fisheries authorization to set a limit to the annual catches of each large-scale fishing operation working under the Minister's permission.[193]

Japanese fishermen had once caught salmon as much as they

liked in the open sea. This custom continued until the United States, Canada, Russia, and Japan concluded a treaty to preserve anadromous runs in the Northern Pacific in 1992. As a general rule, therefore, Japanese fishermen cannot catch salmon in the Northern Pacific (the Sea of Okhotsk and the Bering Sea) north of forty degrees north latitude, except in the water areas within two hundred nautical miles from Japan.

However, Russia conditionally allows Japanese fishermen to catch salmon within two hundred nautical miles from Russia. The condition is decided by an annual non-governmental negotiation between Russia and Japan. In 2002, for example, sixty-three specified Japanese fishing boats were allowed to catch up to a total of eleven thousand tons of salmon within two hundred nautical miles from Russia. At the same time, there is a rule that Japanese fishermen cannot catch Russian salmon even if they are found within two hundred nautical miles of Japan.

b. Private Fishing

As a general rule, people are free to fish in inland water areas such as rivers, lakes, and marshes in Japan, with some exceptions. There are four general regulations regarding private fishing in inland water areas.

First, unlike the United States, where sport fishing of salmon and trout in inland water areas is very popular among people, fishing salmon in inland water areas is strictly forbidden in Japan by the Marine Resources Protection Act of 1951, without a special license to fish or permission of the Minister of Agriculture, Forestry, and Fisheries or the prefectural governors.[194] In Japan, salmon coming back to their original rivers are simply regarded as seed salmon for artificial incubation. Second, the Fishing Act allows the fishermen's cooperative association that has a license to fish commercially inland, to regulate the fishing of a private person who does not have a membership of the association. Private fishermen must follow

private fishing regulations established by a fishermen's cooperative association and authorized by the prefectural governors to provide for the fishing area, fishing fee, fishing permission, and some related rules.[195] Third, according to the Marine Resources Protection Act of 1951, the Minister of Agriculture, Forestry, and Fisheries and prefectural governors are authorized to designate Protected Water Areas in order to protect and multiply aquatic animals and plants.[196] Private fishing is regulated in such Protected Water Areas. Fourth, fishing of certain fish designated by the Minister of Education and Science as a Natural Monument in accordance with the Cultural Properties Protection Act of 1950,[197] or designated as a Rare Wild Animal Species by the Minister of Environment in accordance with the Endangered Species Act of 1992,[198] is regulated too.

There are four main points to regulate private salmon fishing in the ocean areas, particularly near Hokkaido Island. First, salmon fishing at the mouth of some designated rivers in which multiplication projects are carried out is forbidden.[199] Second, salmon fishing is specially limited in some water areas in the Oshima district off Hokkaido Island. Third, there are two specific water areas off Hokkaido Island where salmon fishing from a boat without a license is prohibited.[200] Fourth, same as the private fishing regulations of inland water areas, fishing is regulated in certain water areas designated as Protected Water Areas by the Minister of Agriculture, Forestry, and Fisheries, or a prefectural governor in accordance with the Marine Resources Protection Act of 1951.[201] Fishing of certain fish designated as a Natural Monument by the Minister of Education and Science in accordance with the Cultural Properties Protection Act of 1950,[202] or designated as a Rare Wild Animal Species by the Minister of Environment in accordance with the Endangered Species Act of 1992,[203] is also prohibited. Salmon is designated neither as a Natural Monument nor as a Rare Wild Animal Species.

(3) Summary

Although some poachers are still identified and arrested every year, now salmon fishing is under specific legal regulations in Japan. Both commercial fishing and private fishing of salmon are strictly regulated by statutes and related rules. However, these regulations are basically to protect salmon as commercial goods for the fishing industry or as seed salmon for artificial incubation. Unlike the United States, these regulations are completely lacking in provisions for protection of wild salmon and native people's fishing tradition.

The related statutes have also no provision for research and protecting of wild salmon and their habitat from a watershed management point of view, although they have provisions to encourage artificial incubation and to protect artificial salmon. Recently the average size of salmon caught near Japan has been declining because of the overstocking of rivers with artificial salmon fries. The Japanese government has started to reduce artificial incubation projects. Most Japanese people regard salmon just as food or as a commercial good, and they are still interested in constant salmon fishing supported by artificial incubation. They neither regard salmon as wildlife nor do they want to research and protect them and their natural habitat.

5. Protection of Endangered Species

(1) The United States

Salmon harvest is also often controlled by the Endangered Species Act.[204] The Endangered Species Act of 1972,[205] the most exquisite and powerful protective law for species in the world, places various restrictions on the activities of federal agencies and the general public. The purpose of these restrictions is to ensure the means to preserve the ecosystem which the endangered species or threatened species depend on for their livelihood, and to settle on a

plan for the conservation of those species.[206] The Endangered Species Act requires the Fish and Wildlife Service in the Department of the Interior and the National Marine Fisheries Service in the Department of Commerce to share responsibility for administration of the Act. Except that the Department of Commerce takes charge of marine wildlife, most of the authorities belong to the Department of the Interior. The statute has a broad citizen suit provision so that most actions by federal agencies can be challenged in court.[207]

The object of the Endangered Species Act is to protect endangered species[208] and threatened species.[209] The listing procedure starts with a suggestion from the Secretary of the Interior or the Secretary of Commerce,[210] or a petition of an interested person.[211] The Secretary of the Interior must make a finding as to whether the petitioned action is warranted within twelve months after receiving a petition and publish such finding in the Federal Register.[212] If the Secretary recognizes that it is necessary to designate it, he or she announces it officially in the Federal Resister and gives notice to the appropriate state agency, organizations, and newspapers.[213] The public hearing, if it is required, is held within forty-five days after the publication.[214] According to the best scientific and commercial data available to him or her, the Secretary of the Interior must make the final decision as to whether a species is an endangered species or a threatened species within a one-year period.[215] It is very important that the Secretary of the Interior must not consider economic, political, or social factors in the process.[216]

The Endangered Species Act requires the Secretary of the Interior to designate critical habitat of endangered species and threatened species "to the maximum extent prudent and determinable."[217] Critical habitat means "(i) the special areas within the geographical area occupied by the species, ... 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" where the Secretary of the Interior

decides that such areas are essential for the conservation of the species.[218] The 1978 Amendments of the Endangered Species Act required the Secretary of the Interior to designate critical habitat at the same time he or she designated the endangered species or threatened species. However, the critical habitat designation was making slow progress and sometimes even the designation of species was canceled because the local industrial world often objected to the habitat designations. Therefore, the Endangered Species Act was amended in 1982 to give the Secretary of the Interior two years' grace for critical habitat designation after his or her designation of endangered species or threatened species,[219] and the power to designate critical habitat "to the maximum extent prudent and determinable."[220] The Secretary of the Interior must develop and implement recovery plans for the conservation and survival of endangered species and threatened species.[221] Whenever any species is listed as a threatened species, the Secretary of the Interior must issue protective regulation (s) as he or she deems necessary and advisable to provide for the conservation of such species.[222]

The Secretary of the Interior must review current programs for the conservation of endangered species and threatened species and make another new conservation policy when a certain animal or plant is designated as an endangered species or threatened species.[223] Section 7, one of the key provisions of the Endangered Species Act, requires that each federal agency must avoid any action which will jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or adverse modification of habitat of such species.[224] However, it is important that this prohibition of action applies, as the provision clearly provides, only to federal agency action, not to other action such as private action unless funded or authorized by a federal agency. In 1978 the Endangered Species Act was amended to make it possible for a federal agency to apply to the Secretary of the Interior for an exemption for an agency action.[225] The determination whether or not to grant an exemption must be made by the Endangered Species Committee

(so-called "God Squad") in accordance with very rigorous standards.[226] The exemption process has been rarely used and only two exceptions have been granted. The overriding importance, therefore, of Section 7 is that federal agencies are held to the highest standards in protecting endangered and threatened species.

There are also strict prohibitions of activities of any person regarding endangered species. Section 9 of the Endangered Species Act provides that it is unlawful for any person to import or export, take, deliver, receive, carry, transport, ship, sell or offer for sale in interstate or foreign commerce any endangered species of fish or wildlife listed under the Act.[227] It is also prohibited to possess, sell, deliver, carry, transport, or ship any such species taken in violation of Section 9 (a) (1) (B) and (C).[228] The prohibition of "take", which applies only to endangered species of fish or wildlife and not to plants, is especially worthy of notice because of its wide meaning. 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.[229] The term "take" has been defined by the agencies to include "habitat modification" so that timber harvesting, building, and other development activities are prohibited by Section 9; the Supreme Court has approved this interpretation.[230]

The Endangered Species Act has certainly achieved dramatic effects in listing endangered species and threatened species and preserving the habitats of such species these past thirty years. As mentioned above, seventeen kinds of salmon are on the list of threatened or endangered species.[231] The United States Fish and Wildlife Service in the Department of the Interior, cooperates with state governments, tribal organizations, and citizens, to hold back their extinction.

On the other hand, there are still some problems. First, the listing work of endangered species and threatened species is progressing slowly. In the United States 986 species (388 animals and 598 plants) are listed as endangered species, and 276 species (129 animals and 147 plants) are listed as threatened species.[232] It seems, how-

ever, that the speed of listing work does not meet original expectations because listing plans frequently meet with fierce opposition from local industries, federal and local administrative agencies, and some interested groups or persons. Second, the designation of critical habitat is also making slow progress. Only about 10 percent of the endangered species and threatened species have designated critical habitat. The reasons for delay seem to be that critical habitat is limited to the area which is essential to the conservation of the species and which may require special management considerations or protection. Further, the Secretary of the Interior must consider economic impact and other relevant impact when he or she designate critical habitat,[233] and the Secretary of the Interior is not able to include the entire geographical area occupied by endangered species or threatened species.[234] Third, this complicated Act is not as well funded as it should be, so that protection is sometimes limited by inadequate staffing. None of this, however, should detract from the basic fact that the Endangered Species Act has fundamentally changed the way that America acts toward the natural world.

(2) Japan

The Wildlife Protection and Hunting Act of 1918 was the only statute that could be used to protect endangered animal and plant species until the Endangered Species Act was enacted in 1992. Since the Wildlife Protection and Hunting Act of 1918 has provisions only for game birds and certain other game animals, it is not applicable to fish, amphibia, reptiles, insects, and plants. The Act limits general hunting and hunting in sanctuaries. However, it neither regulates the dealings in captured birds and animals, nor determines any particular way to protect or restore animal population.

In 1980 Japan joined the Convention of International Trade in Endangered Species of Wild Fauna and Flora (CITES), and enacted the Endangered Wild Animal and Plant Trade Regulation Act in 1987 as a domestic statute to execute the Convention.[235] However, the

purpose of the 1987 Act was to regulate the dealings of world-wide endangered species such as elephants, rhinocerous, tigers, and pandas, rather than to protect domestic endangered species. Subject to severe criticism from the international society, in October 1991 the Japanese government quickly drafted an Endangered Species Act bill following the United States' Endangered Species Act, and the Diet quickly passed the bill in 1992.

The Endangered Species Act of 1992 provides that wild animals and plants are not only important components of ecosystem but also parts of the natural environment that is indispensable to the good quality of human life.[236] The purpose of the Act is to ensure healthy and cultured living for both the present and future generations of the nation, through maintaining a good national environment by conserving endangered wild animal and plant species.[237]

The Endangered Species Act provides four groups of endangered species. They are called the Rare Wild Animal and Plant Species. The first group is the Domestic Rare Wild Animal and Plant Species. It contains the rare wild animal or plant species living in Japan, designated by a government ordinance issued by the Prime Minister.[238] If a species population becomes very small or decreases so dramatically that its continuance is doubtful, the species can be designated as a Domestic Rare Wild Animal and Plant Species. The second group is the Special Domestic Rare Wild Animal and Plant Species. It contains the rare wild animal or plant species living in Japan, designated by a government ordinance issued by the Prime Minister. It is possible for these species to be reproduced artificially.[239] The third group is the International Rare Wild Animal and Plant Species. It contains the rare wild animal or plant species that fall under international cooperative protection in accordance with the Washington Treaty and the Migratory Bird Protection Treaty, and designated by a government ordinance issued by the Prime Minister.[240] The fourth group is the Emergency Designated Species. It contains those species that, in the judgment of the Minister of Environment, are in urgent need of preservation. The term of

designation for the Emergency Designated Species is limited to three years.[241]

According to the Endangered Species Act, the Minister of Environment must seek comments from the Central Environment Council when he or she makes plans for a government ordinance regarding any species designation.[242] However, the Minister of Environment is not required to seek comments of any specialist, scientist, the general public, or environmental organization. The basic plan, the standard of designation, and the policy to manage, protect, and reproduce such designated species are not provided in the Act. They are decided in a cabinet council without public participation and presented to the public in a Basic Policy to Conserve Rare Wild Animal and Plant Species.[243]

It is important that the Endangered Species Act only prohibits people from taking "live" individuals without permission issued by the Ministry of Environment.[244] Unlike in the United States, the taking of eggs, seed, organs (fur, skin, horn, tusk, feather, shell, flower, etc.) and processed goods (fur, leather, horn, decorations, footwear, bag, musical instrument, stuffing, specimen, etc.) are not regarded as "live" individuals. It is possible to take "live" individual for the purpose of academic study or reproduction if the Minister of Environment allows one to do so.[245]

It is basically prohibited to transfer, take over, deliver, or receive the Rare Wild Animal and Plant Species. It is also prohibited to export and import an individual of Domestic Rare Wild Animal and Plant Species, and to display Rare Wild Animal and Plant Species for the purpose of sale.[246] There is no regulation in the Endangered Species Act to prohibit people from transferring, exporting, importing, or displaying a Special Domestic Rare Wild Animal and Plant Species.[247]

The Minister of Environment can designate a certain area as a habitat reservation for a Domestic Rare Wild Animal and Plant Species if the Minister recognizes the need to do so.[248] When the Minister of Environment designates a habitat reservation or removes

the designation, the Minister must confer with the related administrative agencies and seek comments from the Central Environment Council and the related local public bodies. The Minister also has to open the draft designation to the general public for fourteen days. The residents living in the area of the draft designation and persons interested can submit their comments to the Minister in the fourteen days. The Minister shall hold a public hearing if an objection is submitted to the Minister, or if the Minister recognizes the need to hold a public hearing.[249] The habitat reservation consists of two kinds of areas: the management area and the observation area. In the management area, it is prohibited to construct or reconstruct a building, develop the land into home lots, clear land, mine, dig earth and sand, reclaim, reclaim by drainage, increase or decrease the level or amount of water, and cut down trees without permission of the Minister of Environment.[250]

(3) Summary

Japanese legislation on endangered species protection is inadequate. The country's biodiversity has declined and will degrade even more in the future unless changes are made. New legislation is needed and the United States' Endangered Species Act is quite useful as a model.

There are a lot of problems about the Endangered Species Act of 1992 in Japan. First, unlike the United States, the general public has no chance at all to participate in the designation of the species. There should be provision to ensure public participation when the Minister of Environment designates species. Second, the interpretations of the term "taking" differs widely from the United States to Japan. As compared with the United States, the designated species are not strongly protected in Japan since the term "taking" is interpreted in a narrow sense. Though it is illegal to kill, injure, or catch living individuals from natural areas, it is lawful to drive a car and snowmobile in the designated species habitat, take pictures of

designated species with a flash bulb, chase designated species, destroy nests of the designated species, and perform development activities in habitat of the designated species such as cutting down forests, manipulating the soil with a bulldozer, and conducting river improvement projects. The term "taking" should be interpreted more widely to include all activities that will harm the designated species and their habitat. Third, the species designation process should go faster. Only fifty-seven species are designated although the Ministry of Environment proclaims in its Red Data Book that 1024 species are now in danger of extinction in Japan. Several reasons are given for failure to designate species, such as lack of necessary scientific data for designation, budget, and fierce opposition from residents and developers who are worried about restriction from the designation. (Some of them are true of the United States Endangered Species Act, too.) Fourth, the designation process of habitat reservations should also proceed more quickly. Only six of fifty-seven designated species have habitat reservations. It is clear that the designated species without habitat reservations are in critical danger. Fifth, trade in the Special Domestic Rare Wild Animal and Plant Species should be regulated. Now six of eight designated plant species are Special Domestic Rare Wild Animal and Plant Species. Since the Act does not regulate the artificial reproduction and trade of them, there is no end to the theft of the Special Domestic Rare Wild Animal and Plant Species from wild areas. Sixth, the Ministry of Environment has planned and executed the protection and multiplication projects only for nineteen of fifty-seven designated species. Seventh, although provisions of the Endangered Species Act should be equally applicable to everybody and every activity, the provision prohibiting taking of the designated species is not applicable to public projects under sponsorship of the national government or local governments. It is very strange. The Diet should fully recognize and prohibit the possibility that governmental activities may "take" the designated species. Eighth, as to wild salmon, the Japanese government should research and publicize the current situation of wild salmon. No

salmon is designated under the Endangered Species Act of 1992 at present, yet it is doubtful that no salmon is in danger of extinction.[251]

Notes

153. An Act to provide for water pollution control activities in the Public Health Service of the Federal Security Agency and in the Federal Works Agency, and for other purposes. 33 U.S.C.A. §§ 1251 to 1263, 1265 to 1270, 1281 to 1299, 1311 to 1326, 1328 to 1330, 1341 to 1345, 1361 to 1377, 1381 to 1387 (West 2001); Pub. L. No. 845, Chap. 758, 62 Stat. 1155 (1948).
154. The Federal Water Pollution Control Act provided that it is the policy of Congress "to recognize, preserve, and protect the primary responsibilities and rights of the States in controlling water pollution, to support and aid technical research to divise and perfect methods of treatment of industrial wastes which are not susceptible to known effective methods of treatment, and to provide Federal technical services to State and interstate agencies and to industries, and financial aid to State and interstate agencies and to municipalities, in the formulation and execution of their stream pollution abatement programs." The Act gave the States the primary responsibilities and rights to control water pollution, but at the same time it also gave the Surgeon General of the Public Health Service (under the supervision and direction of the Federal Security Administrator) and the Federal Works Administrator the responsibilities and authority relating to water pollution control. Pub. L. No. 845, Chap. 758, §1, 62 Stat. 1155, 1155 (1948).
155. The Act authorized the Surgeon General to make joint investigations with any Federal agencies, State water pollution agencies, and interstate agencies "of the condition of any waters in any State or States, and of the discharges of any sewage, industrial wastes, or substance which may deleteriously affect such waters." Pub. L. No. 845, Chap. 758, §2 (a), 62 Stat. 1155, 1155 to

1156 (1948). The Surgeon General "may, upon request of any State water-pollution agency or interstate agency, conduct investigations and research and make surveys concerning any specific problem of water pollution confronting any State, interstate agency, community, municipality, or industrial plant, with a view to recommending a solution of such problem." Pub. L. No. 845, Chap. 758, §3, 62 Stat. 1155, 1157 (1948). The Federal Works Administrator is authorized "to make loans to any State, municipality, or interstate agency for the construction of necessary treatment works to prevent the discharge by such State or municipality of untreated or inadequately treated sewage or other waste into interstate waters or into a tributary of such waters, and for the preparation (either by its engineering staff or by practicing engineers employed for that purpose) of engineering reports, plans, and specifications in connection therewith." However, such loans shall be subject to the four limitations. Pub. L. No. 845, Chap. 758, §5, 62 Stat. 1155, 1158 (1948).

156. The Air Pollution Control Act of 1955 authorized federal program in air pollution research and training. An Act to provide research and technical assistance relating to air pollution control. 42 U.S.C.A. §7401 to 7671q (West 2003); Pub. L. No. 159, Chap. 360, 69 Stat. 322 (1955). The Air Pollution Control Act, similar to the Federal Water Pollution Control Act, provided that it is the policy of Congress "to preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution, to support and aid technical research to devise and develop methods of abating such pollution, and to provide Federal technical services and financial aid to State and local government air pollution control agencies and other public or private agencies and institutions in the formulation and execution of their air pollution abatement research programs." The Act gave the States and local governments the primary responsibilities and rights to control air pollution, but at the same time it also gave the Secretary of

Health, Education, and Welfare and the Surgeon General of the Public Health Service (under the supervision and direction of the Secretary of Health, Education, and Welfare) the authority relating to air pollution control. Pub. L. No. 159, Chap. 360, §1, 69 Stat. 322, 322 (1955). The Air Pollution Control Act authorized the Surgeon General to (1) prepare or recommend research programs for devising and developing methods for eliminating or reducing air pollution, and (2) to make joint investigations with any Federal agencies, State and local government air pollution control agencies, and other public and private agencies and institutions. Pub. L. No. 159, Chap. 360, §2 (a), 69 Stat. 322, 322 (1955).

157. An Act to establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes, 42 U.S.C.A. §4321, 4331 to 4335, 4341 to 4347 (West 2001); Pub. L. No. 91-190, 83 Stat. 852 (1970). See also section III.A.1 (1) of this paper.
158. Reorganization Plan No. 3 of 1970 (July 9, 1970) (reprinted in 1970 U.S.C.C.A.N. 6322, 6322 to 6325), 84 Stat. 2086 (1970); Reorganization Plan No. 4 of 1970 (July 9, 1970) (reprinted in 1970 U.S.C.C.A.N. 6325, 6325 to 6336), 84 Stat. 2090 (1970); 40 C. F.R.1 to 799 (2002).
159. Roger W. Findley & Daniel A. Farber, *Environmental Law* 121 (5th ed., West 2000).
160. The Clean Water Act provides two national goals and five national policies to achieve this object. The two national goals are: (1) that the discharge of pollutants into the navigable waters be eliminated by 1985; and (2) that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983. The five national policies are: (1) that the discharge of toxic pollutants in toxic amounts be prohibited; (2) that Federal financial assistance be provided to construct publicly owned waste treat-

ment works; (3) that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; (4) that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and (5) that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution. 33 U.S.C.A. §1251 (a) (West 2001).

161. The term "point source" means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C.A. §1362 (14) (West 2001).
162. See Daniel M. Steinway, *Supreme Court Asked To Review EPA Authority Over Non-Point Source Pollution*, American Lawyer's Corporate Counsel Magazine (April 2003), as a recent study of the Environmental Protection Agency's authority over non-point source pollution.
163. Originally the authority to issue permits is given to the Environmental Protection Agency, but the agency is able to transfer it to the States. Now, about forty states are transferred the authority.
164. The purposes of the Water Pollution Control Act are "to prevent the pollution of water (including form of deterioration of the condition of water other than the deterioration of water quality) in the Public Water Areas by regulating effluent discharged by factories or establishments into the Public Water Areas, thereby to protect human health and to preserve the living environment

and to protect sufferers by setting forth stipulations regarding the responsibilities of the proprietors of factories or establishments to compensate the damage in cases where human health is damaged by polluted water or wastewater discharged from factories or establishments". §1, the Water Pollution Control Act, Law No.138 of 1970. The Public Water Areas means "the water areas of public use such as rivers, lakes ports and harbors, costal seas, etc., including such waterways connected thereto as public waterways, irrigation waterways and other waterways subject to public use (excluding public sewers and river-basin sewers for which a terminal-treatment plant is established)." §2 (1), the Water Pollution Control Act, Law No. 138 of 1970.

165. The Specific Facilities means "those facilities which discharge polluted water or wastewater meeting either of the following conditions, and which are to be specified by Cabinet Order: (a) Containing cadmium or other substances to be specified by Cabinet Order as substances which may cause harmful damage to human health: (b) Being of a degree, that may cause damage to the living environment, as chemical oxygen demand and other substances, to be specified by Cabinet Order as showing the condition of water pollution." §2 (2), the Water Pollution Control Act, Law No. 138 of 1970.
166. The report must include the following matters; (a) name of appellation and address, (b) name and address of the factory or the establishment, (c) type of the Specified Facility, (d) structure or construction of the Specified Facility, (e) method of use of the Specified Facility, (f) method of treatment of polluted water or wastewater to be discharged from the Specified Facility, (g) the state of pollution and quantity of the effluents, and (h) other matters stipulated by Order of the Prime Minister's Office". §5 (1), the Water Pollution Control Act, Law No. 138 of 1970.
167. §8, the Water Pollution Control Act, Law No. 138 of 1970.
168. §16 (1), the Environment Basic Act, Law No. 91 of 1993.
169. §16, the Environment Basic Act, Law No. 91 of 1993.

170. Two kinds of standard constitute the Water Quality Standard. They are Health standard (26 items) and Life Environment standard (9 items). Hatakeyama, *supra* note 59, 19.
171. §3, the Water Pollution Control Act, Law No.138 of 1970.
172. §§3 (3) and 29, the Water Pollution Control Act, Law No. 138 of 1970.
173. There are three water areas designated as such wide and closed water area where are controlled by the total amount drainage control system. They are the Tokyo Bay, Ise Bay (in front of the city of Nagoya), and Setonai Sea. §4-2 (1), the Water Pollution Control Act, Law No.138 of 1970; §4-3, the Water Pollution Control Act Enforcement Ordinance, Ordinance No.188 of 1971, §12-3, the Setonai Sea Environmental Conservation and Special Measures Act, Law No.110 of 1973.
174. See generally Lichatowich, *supra* note 33, at 104-108. In the late 1800s, after the treaties were concluded between some Indian tribes and the United States federal government, state governments administrated fisheries and fishermen in the Pacific Northwest. The California's Board of Fish Commissions was established in 1870, the Oregon's State Fish Commission was established in 1878, and the Washington Fish Commission was established in 1890. Although these fish commissions were created, the legislatures retained the authority to regulate the commercial fisheries. The Washington legislature started first controlling on salmon fishery in 1859. It prohibited non-residents' fishing and limited the area that salmon-fishing gear could be used in parts of the Colombia River. The Oregon legislature followed the practices soon. However, these "legislatures' first attempts to regulate fisheries were generally the product of intuition and political pressure from the industry, with little or no science applied" Lichatowich, *supra* note 33, at 104.

The Marine Product Industry in the Pacific Northwest made rapid progress in the decade from 1885 to 1895. It is proved by

the dramatically increase of the numbers of gillnets, traps, and fish-wheels in the Columbia River. Salmon fisheries were sharply contested because "more canneries simply demanded for more salmon to keep the lines running." In 1895, Mr. Marshall McDonald from the United States Commission of Fish and Fisheries studied the condition of the spawning stocks of salmon to evaluate the effectiveness of the existing regulation. He concluded that over-harvest was evident and predicted that abundance would decline. The States of Washington and Oregon enacted fishing statutes in order to regulate the fishing ground, fishing dates, or fishing implements. However, it was not easy to carry out the statutes because the marine product industry people took the economical lead in the communities and were also influential politicians of the area. Lichatowich, *supra* note 33, at 105-106.

The State of the Union Message of the President Theodore Roosevelt in 1908 provided a key to overcome the difficulties. He suggested the introduction of federal control over the fisheries instead of State control. The suggestion encouraged the States who did not want to loose their authorities. In 1909, "the legislatures of Oregon and Washington finally worked together to craft a single set of regulations for the Columbia River salmon fishery." It continued "until 1918 when Congress approved an interstate compact between Oregon and Washington to regulate the harvest of salmon on the Columbia River. Lichatowich, *supra* note 33, at 108.

175. Wilkinson & Conner, *supra* note 17, at 43-61; Wilkinson, *supra* note 26, at 209-214.
176. Wilkinson & Conner, *supra* note 17, at 61.
177. An Act to provide for the conservation and management of the fisheries, and for other purposes. Pub. L. No. 94-265, 90 Stat. 331 (1976). In the United States, the water areas as far as three miles off from the seashore are within the jurisdiction of each State. The water areas from three to 200 nautical miles from

the seashore are under the federal government control and are jointly managed in association with foreign country (such as Canada), States, and Indian tribes.

The Act "established a zone contiguous to the territorial sea of the Unites States to be known as the fishery conservation zone. The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured." The Act provided that the United States exercises exclusive fishery management authority over "(1) all fish within the fishery conservation zone, (2) all anadromous species throughout the migratory range of each such species beyond the fishery conservation zone; except that such management authority shall not extend to such species during the time they are found within any foreign nation's territorial sea or fishery conservation zone (or the equivalent), to the extent that such sea or zone is recognized by the United States, and (3) all Continental Shelf fishery resources beyond the fishery conservation zone." Pub. L. No. 94-265, §§101 and 102, 90 Stat. 331, 336 (1976).

Moreover, in 1983 a Proclamation established an Exclusive Economic Zone. It is a zone "contiguous to the territorial sea, including the Commonwealth of the Puerto Rico, the Commonwealth of the Northern Mariana Islands 〔to the extent consistent with the Covenant and the United Nations Trusteeship Agreement〕, and the United States overseas territories and possessions. The Exclusive Economic Zone extends to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured." "Within the Exclusive Economic Zone, the United States has, to the extent permitted by international law, (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil

and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds." Executive Economic Zone of the United States of America, Exec. Procl. 5030, 48 Fed. Reg. 10605, 10605 (Mar. 14, 1983).

178. The Magnuson-Stevens Fishery Conservation and Management Act established eight regional fishery management councils. They are the New England Fishery Management Council, the Mid-Atlantic Fishery Management Council, the South Atlantic Fishery Management Council, the Caribbean Fishery Management Council, the Gulf of Mexico Fishery Management Council, the Pacific Fishery Management Council, the North Pacific Fishery Management Council, and the Western Pacific Fishery Management Council. Pub. L. No. 94-265, §302, 90 Stat. 331, 347-348 (1976).

Among them, especially the Pacific Fishery Management Council and the North Pacific Fishery Management Council participate in the management of the Pacific Northwest salmon fishery. The Pacific Fishery Management Council consists of States of California, Oregon, Washington, and Idaho and has authority over the fisheries in the Pacific Ocean seaward of such States. The Pacific Fishery Management Council has thirteen voting members, including eight appointed by the Secretary (at least one of whom is to be appointed from such each State). The North Pacific Fishery Management Council consists of States of Alaska, Washington, and Oregon and has authority over the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska. The North Pacific Fishery Management Council has eleven voting members, including seven appointed by the Secretary (five of whom are to be appointed from the State of Alaska and two are to be appointed from the State of Washington).

The Pacific Fishery Management Council, which consists of

the principal fisheries officials from the States of Alaska, Washington, Oregon, and California, the regional director of the National Marine Fisheries Service of the Department of Commerce, and eight private citizens appointed by the Secretary of the Commerce from lists submitted by each state governor, is responsible for fisheries off the coasts of Washington, Oregon, and California. There are several different regions and groups in salmon fisheries managed by the Pacific Fishery Management Council. The Magnuson-Stevens Fishery Conservation and Management Act requires the Pacific Fishery Management Council to make a Salmon Fishery Management Plan to describe the goals and methods for salmon management. The Salmon Fishery Management Plan contains two important parts: an annual goal for the number of spawners of the major salmon stocks ("spawner escapement goals") and allocation of the harvest among different groups of fishers (commercial, recreational, tribal, various ports, ocean, and inland). The Salmon Technical Team and the Salmon Advisory Sub-panel are to cooperate the Pacific Fishery Management Council by furnishing scientific data and professional advice for setting the goals and methods such as season length, quotas, and beg limits for adequate salmon management.

179. The Pacific Salmon Commission was established by the Treaty between the government of Canada and the government of the United States concerning Pacific Salmon signed at Ottawa, January 28, 1985. See also An Act to give effect to the Treaty Between the Government of the United States of America and the Government of Canada Concerning Pacific Salmon, signed at Ottawa, January 28, 1985 (Pacific Salmon Treaty Act of 1985), Pub. L. No. 99-5, 99 Stat. 7 (1985). The Commission consists of representatives of Alaska, Washington, Oregon, and Canada, the treaty Indian tribes of Washington and the Columbia River, and the federal government.

180. The fish and wildlife departments of the States of Washington,

Oregon, and California now have various salmon harvest rules.

181. Tribes join the regulative activities mainly by the two organizations: the Columbia Inter-Tribal Fish Commission and the Northwest Indian Fisheries Commission. See also section III.B. 1 (3) of this paper.
182. The Fishing Act, Law No. 267 of 1949.
183. The Ex-Fishing Act, Law No. 58 of 1910, was repealed and the present Fishing Act was enacted in 1949 in order to ensure the democratization of fishing industry.
184. Fixed-net fishing means fishing with fixed-nets reach more than twenty seven meters deep, and means salmon fishing in Hokkaido Island area. Fishing in subdivisions means raise fishing with the material of stones, tiles, bamboos, and wood in a certain water area. §§6 (3) and (4), the Fishing Act, Law No. 267 of 1949.
185. It is possible to divide or change fishing right with a prefectural governor's permission. §22 (1), the Fishing Act, Law No. 267 of 1949. A fishing right holder is able to suspend fishing for a while with a prefectural governor's permission. §35, the Fishing Act, Law No. 267 of 1949. A prefectural governor can revoke the fishing right in the case its holder suspends fishing for more than one year after the issue day of fishing license or the holder suspends continuously for more that two years. §37 (1), the Fishing Act, Law No. 267 of 1949. A prefectural governor can also revoke fishing right for public interest. §39, the Fishing Act, Law No. 267 of 1949.
186. §27, the Fishing Act, Law No. 267 of 1949. In the case a fishermen's cooperative association neglects its duty to multiply aquatic animals and plants, a prefectural governor may order the association to multiply them in accordance with a multiplication plan which is made by the prefectural governor cooperated with a prefectural Inland Fishing Ground Management Commission. A prefectural governor must revoke the fishing right if its holder, a fishermen's cooperative association, does not obey the prefectural governor's order. §128 and 130, the Fishing Act, Law

No. 267 of 1949.

187. The term of existence depends upon the kind of fishing right. For example, fishing right for pearl culture or joint fishing right generally continues for ten years, but most of other kinds of fishing rights continue for five years. Further, a prefectural governor is authorized to establish a short term fishing right than five years at his or her discretion. §21, the Fishing Act, Law No.267 of 1949.
188. §7, the Fishing Act, Law No. 267 of 1949.
189. §42-2, the Fishing Act, Law No. 267 of 1949. The entrance right to a piscary is good for limited conditions only. Fishing area, kind of fish, fishing season and term, fishing fee, fishing way, and kind of fishing implements are decided by personal negotiation between fishing right holder and a applicant for an entrance right to a piscary. §44, the Fishing Act, Law No. 267 of 1949.
190. §66 (1), the Fishing Act, Law No. 267 of 1949.
191. §52, the Fishing Act, Law No. 267 of 1949. There are sixteen kinds of fishing that the Minister of Agriculture, Forestry, and Fisheries can issue permission for fishing. They are designated by a government ordinance.
192. §65, the Fishing Act, Law No. 267 of 1949. To assist the Minister and prefectural governors, the Fishing Adjustment Commissions are established under the Minister and prefectiral governors. There are three kinds of the Fishing Adjustment Commission. The Wide Area Fishing Adjustment Commission belongs to the Minister. The Sea Area Fishing Adjustment Commission and the Alliance Sea Area Fishing Adjustment Commission belong to prefectural governors. §82, the Fishing Act, Law No. 267 of 1949. These Fishing Adjustment Commissions are to consist of representatives selected from fishermen, scholars, and representatives of the general public appointed by a prefectural governor. §§84 to 111, the Fishing Act, Law No. 267 of 1949.
193. In the case the Minister of Agriculture, Forestry, and Fisheries

sets a limit, the Minister must submit the limit plan to the Marine Policy Commission in advance. §13, the Marine Resources Protection Act, Law No. 313 of 1951.

194. §25, the Marine Resources Protection Act, Law No. 313 of 1951. However, there are two exceptions. (1) Hokkaido Sake Masu Zoshoku Jigyo Kyokai (the Hokkaido Salmon and Trout Multiplication Service Association) is allowed to catch salmon and trout at fifty three locations on fifty rivers in Hokkaido Island for the purposes of multiplication. More detail information upon the association is available at 〈http://www.sake-masu.or.jp/index.htm〉. (2) The local governments are allowed to issue a special permission to some private fishermen in order to research a possibility to use salmon and trout as fishing resources or environmental teaching materials. In this context, the term trout (masu) includes Sakura-masu (Masu salmon), Karafuto-masu (Pink), Beni-masu (Sockeye), Gin-masu (Coho), and Masunosuke (Chinook). In 2001, for example, some private fishermen were given the special permissions to fish salmon and trout for the purpose of the research held in the four rivers (the Chubetsu River, the Motoura River, the Charo River, and the Hamamasu River) in Hokkaido Island.
195. §129, the Fishing Act, Law No. 267 of 1949.
196. §§14 and 15, the Marine Resources Protection Act, Law No. 313 of 1951.
197. §69, the Cultural Properties Protection Act, Law No. 214 of 1950.
198. §4, the Endangered Species Act, Law No. 75 of 1992.
199. In Hokkaido Island, salmon fishing at the designated forty-one rivers' mouths was forbidden in 2001.
200. In the term from late August to late September, salmon fishing from a fishing boat without a license is prohibited at the certain water areas close to the districts of Abashiri and Nemuro (eastern part of Hokkaido Island). In the term from December to March, Masu salmon fishing from a fishing boat without a license is prohibited at the certain water areas close to the

districts of Iburi (southern part of Hokkaido Island).

201. §§14 and 15, the Marine Resources Protection Act, Law No. 313 of 1951.
202. §69, the Cultural Properties Protection Act, Law No. 214 of 1950.
203. §4, the Endangered Species Act, Law No. 75 of 1992.
204. In the 1990s the Fish and Wildlife Service started to designate and protect some kinds of salmon as endangered species or threatened species under the Endangered Species Act of 1973. As mentioned above, taking of the designated species is strictly prohibited by the Act. See also note 44.
205. An Act to provide for the conservation of endangered and threatened species of fish, wildlife, and plants, and for other purposes. Pub. L. No. 93-205, 87 Stat. 884 (1973). 7 U.S.C.A. §136 (West 1999); 16 U.S.C.A. §§460l-9, 460k-1, 668dd, 715i, 715a, 1362, 1371, 1372, 1402, 1531 to 1543 (West 2000). The Endangered Species Act of 1972 was formerly the Endangered Species Preservation Act of 1966 (An Act to provide for the conservation, protection, and propagation of native species of fish and wildlife, including migratory birds, that are threatened with extinction; to consolidate the authorities relating to the administration by the Secretary of the Interior of the National Wildlife Refuge System; and for other purposes. Pub. L. No. 89-669, 80 Stat. 926 (1966)) and the Endangered Species Conservation Act of 1969 (An Act to prevent the importation of endangered species of fish or wildlife into the United States: to prevent the interstate shipment of reptiles, amphibians, and other wildlife taken contrary to State law: and for other purposes. Pub. L. No. 91-135, 83 Stat. 275 (1969)). The purposes of the Endangered Species Preservation Act of 1966 were "to provide a program for the conservation, protection, restoration, and propagation of selected species of native fish and wildlife, including migratory birds, that are threatened with extinction, and to consolidate, restate, and modify the present authorities relating to administration by the Secretary of the Interior of the National Wildlife

Refuge System." Pub. L. No. 89-669, §1, 80 Stat. 926, 926 (1966). It was an epoch-making statute in the points of that it not only provided punishment for infringing the rules but also declared that the federal government must assume responsibility for making a plan and financial support to protect the endangered species. The Endangered Species Preservation Act of 1966 authorized Secretary of the Interior to regulate the activities on public lands in national wildlife refuge system (Pub. L. No. 89-669, §4, 80 Stat. 926, 927-929 (1966)) and approved that the total sum to acquire the planned lands and waters shall not exceed fifteen million dollars. Pub. L. No. 89-669, §2 (c), 80 Stat. 926, 927 (1966). However, it lacked the detail provision to designate the endangered species.

The Endangered Species Conservation Act of 1969 extended the authority of the Secretary of the Interior to acquire lands, stated clearly the objects for protection, and prohibited the trade and interstate-transfer of wildlife or a part of it which was took against the state statutes or foreign statutes. Same as the Endangered Species Preservation Act of 1966, however, the Endangered Species Conservation Act of 1969 did neither prohibit the taking by private persons nor regulate the administrative agencies' activities that threaten species existence. As the environmental movement rose in the 1970s, people became discontented with the 1969 Act to protect endangered species. At that time the Marine Mammal Protection Act (An Act to protect marine mammals; to establish a Marine Mammal Commission; and for other purposes. 16 U.S.C.A. §1361, 1362, 1371 to 1384, 1401 to 1407, 1411 to 1418, 1421, 1421a to 1421h (West 2000); Pub. L. No. 92-522, 86 Stat. 1027 (1972)) was under deliberation. It was the predominant opinion at the deliberation that the marine mammal must be protect in its "decreasing" stage, not in its "endangered" stage. Public opinion about the endangered species was almost same as it. President Richard Nixon, who is very enthusiastic about protecting animals, declared in his

Executive Order No. 11643 on February 8, 1972, that the purposes and policies of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and the Endangered Species Conservation Act of 1969 (16 U.S.C. 668aa) are in need of furtherance. Environmental Safeguards on Activities for Animal Damage Control on Federal Lands, Exec. Or. 11643, 37 Fed. Reg. 2875 (Feb. 8, 1972). Then a new bill was introduced by Representative Dingell (Michigan). The bill was passed on December 28, 1973. An Act to provide for the conservation of endangered and threatened species of fish, wildlife, and plants, and for other purposes. Pub. L. No. 93-205, 87 Stat. 884, 884-903 (1973).

206. In the Endangered Species Act, Congress finds and declares that "(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation; (2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction; (3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people; (4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to (A) migratory bird treaties with Canada and Mexico; (B) the Migratory and Endangered Bird Treaty with Japan; (C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere; (D) the International Convention for the Northwest Atlantic Fisheries; (E) the International Convention for the High Seas Fisheries of the North Pacific Ocean; (F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and (G) other international agreements; and (5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation

programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants." 16 U.S.C.A. §1531 (a) (West 2000). The Endangered Species Act has three main purposes. They are: "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section." 16 U.S.C.A. §1531 (b) (West 2000).

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." 16 U.S.C. A. §1532 (8) (West 2000). The term "plant" means "any member of the plant kingdom, including seeds, roots and other parts thereof." 16 U.S.C.A. §1532 (14) (West 2000). 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." 16 U.S.C.A. § 1532 (3) (West 2000). The term "species" includes "any sub-

species of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C.A. §1532 (16) (West 2000).

The Endangered Species Act absolutely prohibits the federal government's and private person's activities and taking which threaten the species existences, except for very limited exceptions. The Endangered Species Act is the world's first Act that recognizes that the preservation of endangered species comes before human activities and that human activities may be regulated for it. That is why the Act is called a new age's statement that has completely changed the previous view of nature or rights.

207. The Endangered Species Act contains a citizen suits provision which states, "any person may commence a civil suit on his own behalf." 16 U.S.C.A. §1540 (g) (1) (West 2000).
208. 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 (of the Interior) to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man." 16 U.S.C.A. §1532 (6) (West 2000).
209. 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." 16 U.S.C.A. §1532 (20) (West 2000).
210. The Secretary of the Interior shall by regulation 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." 16 U.S.C.A. §1533 (a) (1) (West 2000). "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." 16 U.S.C.A. §1533 (a) (2) (West 2000).

211. According to 50 C.F.R. §424. 14 (a), any interested person may submit a written petition to the Secretary of the Interior under the provision. Each agency shall "give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C.A. §553 (e) (West 1996). "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." 16 U.S.C.A. §1533 (b) (3) (A) (West 2000).

212. "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 (of the Interior) 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." 16 U.S.C.A. § 1533 (b) (3) (B) (West 2000).

213. "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." 16 U.S.C.A. §1533 (b) (5) (West 2000).

214. See 16 U.S.C.A. §1533 (b) (5) (E) (West 2000).

215. "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 (of the Interior) 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." 16 U.S.C.A. §1533 (b) (6) (A) (West 2000).

It is possible to extend the one-year period for not more than six months conditionally. "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. 16 U.S.C.A. § 1533 (b) (6) (B) (i) (West 2000).

216. The decision is to be made by the Secretary of the Interior "solely on the bases 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." 16 U.S.C.A. §1533 (b) (1) (A) (West 2000). It must be a neutral objective decision. Before the Endangered Species Act was amended in 1982 there has been a room for considering economical factor when the Secretary of the Interior selects the candidate since there was not a word "solely" in the provision. An Act to provide for the conservation of endangered and threatened species of fish, wildlife, and plants, and for other purposes. Pub. L. No. 93-205, §4 (b), 87 Stat. 884, 887 (1973); An Act to authorize appropriations to carry out the provisions of the Endangered Species Act of 1973 for fiscal years 1983, 1984, and 1985, and for other purposes, Pub. L. No. 97-304, §2, 96 Stat. 1411, 1411 (1982).

Moreover, the Endangered Species Act provides the procedures for emergency regulation. The Secretary of the Interior can omit all of the regular designating procedure and issue any regulation "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." 16 U.S.C.A. §1533 (b) (7) (West 2000). Such emergency regulation is only good for 240 days. It will lose effect automatically if no official rulemaking procedures are took during the days. 16 U.S.C.A. §1533 (b) (7) (West 2000).

217. The Secretary of the Interior, "by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable (A) 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." 16 U.S.C.A. §1533 (a) (3) (A) (West 2000).

218. 16 U.S.C.A. §1532 (5) (A) (i) (West 2000). It has been a common way to protect wildlife individually before the Endangered Species Act was enacted. The Act is the first federal law in the United states which sets the habitat protection in the center of its protection policy.

219. The Secretary of the Interior may extend the one-year period by not more than one additional year conditionally. "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 mush publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat." 16 U.S.C.A. §1533 (b) (6) (C) (West 2000).

220. 16 U.S.C.A. §1533 (a) (3) (A) (West 2000).

221. The Secretary of the Interior "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." 16 U.S.C.A. §1533 (f) (1) (West 2000). Prior to find approval of a new or revised recovery plan, the Secretary of the Interior shall "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." 16 U.S.C.A. §1533 (f) (4) (West 2000).

222. 16 U.S.C.A. §1533 (d) (West 2000).

223. "All other Federal agencies shall, in consultation with and with the assistance of the Secretary (of the Interior), 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." 16 U.S.C.A. §1536 (a) (1) (West 2000).

224. "Each Federal agency shall, in consultation with and with the assistance of the Secretary (of the Interior), 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 (Endangered Species) 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." 16 U.S.C. A. §1536 (a) (2) (West 2000). It is widely-known fact that in 1978 the United States Supreme Court ordered the suspension of the Tellico Dam construction, which has almost completed with a large amount of budget, for a breach of this provision. See Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

225. "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 (Endangered Species) Committee for a final determination under subsection (h) of this section after a report is made pursuant to paragraph (5)." 16 U.S.C.A. §1536 (g) (1) (West 2000).

226. "The Secretary (of the Interior) 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)." 16 U.S.C.A. §1536 (g) (3) (West 2000). "If the Secretary (of the Interior) 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 (Endangered Species) 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)." 16 U.S.C.A. § 1536 (g) (4) (West 2000).

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 (of the Interior), the Secretary (of the Interior) shall submit to the (Endangered Species) Committee (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) appropri-

ate reasonable mitigation and enhancement measures which should be considered by the (Endangered Species) 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." 16 U.S.C.A. §1536 (g) (5) (West 2000). "All meetings and records resulting from activities pursuant to this subsection shall be open to the public." 16 U.S.C.A. §1536 (g) (8) (West 2000).

The Endangered Species Act provides the establishment of the Endangered Species Committee. The primary mission of the Committee is to "review any application submitted to it pursuant to this section and determined 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." 16 U.S.C.A. §1536 (e) (2) (West 2000).

"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 (of the Interior), 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." 16 U.S.C.A. §1536 (e) (3) (West 2000). "The Secretary of the Interior shall be the Chairman of the Committee." 16 U.S.C.A. §1536 (e) (5) (B) (West 2000). "All meetings and records of the Committee shall be open to the

public." 16 U.S.C.A. §1536 (e) (5) (D) (West 2000).

Within 30 days after receiving the report of the Secretary of the Interior, the Endangered Species Committee must make a final determination whether or not to grant an exemption to the applicant. There is a great possibility that the Committee's determination decides the destiny of the species concerned. That is why the Committee is called the "God Squad." "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 (of the Interior), 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." 16 U. S.C.A. §1536 (h) (1) (West 2000).

227. 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 Unites 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." 16 U.S.C.A. §1538 (a) (1) (West 2000).

228. It is unlawful for any person subject to the jurisdiction of the United States to "possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such (endangered) species (of fish or wildlife listed pursuant to section 4 of the Endangered Species Act) taken in violation of subparagraphs (B) and (C)." 16 U.S.C. A. §1538 (a) (1) (D) (West 2000).

With respect to endangered species of plants listed under the Endangered Species Act, it is "unlawful for any person subject to the jurisdiction of the United States to (A) import any such species into, or export any such species from, the Unites 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; (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." 16 U. S.C.A. §1538 (a) (2) (West 2000). These prohibitions were added

in 1982 Amendments of the Act.

It is also prohibited to 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. 16 U.S.C.A. §1538 (a) (2) (B) (West 2000). These prohibitions were added in 1988 Amendments of the Act.

229. 16 U.S.C.A. §1532 (19) (West 2000). It is unlawful to take endangered species of fish and wildlife indirectly or unconsciously, to say nothing of taking them directly or consciously. However, there are specific exemptions from the prohibition provided in section 7. "The prohibitions set forth in or authorized pursuant to sections 1533 (d) and 1538 (a) (1) (B) of this title shall not apply with respect to the taking of any resident endangered species or threatened species (other than species listed in Appendix I to the Convention or otherwise specifically convered by any other treaty or Federel law) within any State (A) which is then a party to a cooperative agreement with the Secretary (of the Interior) pursuant to subsection (c) of this section (except to the extent that the taking of any such species is contrary to the law of such State); or (B) except for any time within the establishment period when (i) the Secretary (of the Interior) applies such prohibition to such species at the request of the State, or (ii) the Secretary (of the Interior) applies such prohibition after he finds, and publishes his finding, that an emergency exists posing a significant risk to the well-being of such species and that the prohibition must be applied to protect such species. The Secretary's finding and publication may be made without regard to the public hearing or comment provisions of section 553 of Title 5 or any other provision of this chapter; but such prohibition shall expire 90 days after the date of its imposition unless the Secretary further extends such prohibition by publishing notice and a statement of justification of such extention." 16 U.S.C.A. §1535 (g) (2) (West 2000).

Moreover, section 10 of the Act also provides a lot of exemptions from application of section 9. As some examples, the Secretary of the Interior "may permit, under such terms and conditions as he shall prescribe (A) any act otherwise prohibited by section 1538 of this title for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section; or (B) any taking otherwise prohibited by section 1538 (a) (1) (B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C.A. §1539 (a) (1) (West 2000).

"If any person enters into a contract with respect to a species of fish or wildlife or plant before the date of the publication in the Federal Register of notice of consideration of that species as an endangered species and the subsequent listing of that species as an endangered species pursuant to section 1533 of this title will cause undue economic hardship to such person under the contract, the Secretary (of the Interior), in order to minimize such hardship, may exempt such person from the application of section 1538 (a) of this title to the extent the Secretary (of the Interior) deems appropriate if such person applies to him for such exemption and includes with such application such information as the Secretary (of the Interior) may require to prove such hardship; except that (A) no such exemption shall be for a duration of more than one year from the date of publication in the Federal Register of notice of consideration of the species concerned, or shall apply to a quantity of fish or wildlife or plants in excess of that specified by the Secretary (of the Interior); (B) the one-year period for those species of fish or wildlife listed by the Secretary (of the Interior) as endangered prior to December 28, 1973 shall expire in accordance with the terms of section 668cc-3 of this title; and (C) no such exemption may be granted for the importation or exportation of a specimen listed

in Appendix I of the Convention which is to be used in a commercial activity." 16 U.S.C.A. §1539 (b) (1) (West 2000).

The Endangered Species Act "shall not apply with respect to the taking of any endangered species or threatened species, or the importation of any such species taken pursuant to this section, by (A) any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska; or (B) any non-native permanent resident of an Alaskan native village; if such taking is primarily for subsistence purposes. Non-edible byproducts of species taken pursuant to this section may be sold in interstate commerce when made into authentic native articles of handicrafts and clothing; except that the provisions of this subsection shall not apply to any non-native resident of an Alaskan native village found by the Secretary (of the Interior) to be not primarily dependent upon the taking of fish and wildlife for consumption or for the creation and sale of authentic native articles of handicrafts and clothing." 16 U.S.C.A. §1539 (e) (1) (West 2000).

"Sections 1533 (d) and 1538 (a) and (c) of this title do not apply to any article which (A) is not less than 100 years of age; (B) is composed in whole or in part of any endangered species or threatened species listed under section 1533 of this title; (C) has not been repaired or modified with any part of any such species on or after December 28, 1973; and (D) is entered at a port designated under paragraph (3)." 16 U.S.C.A. §1539 (h) (1) (West 2000).

"Any importation into the United States of fish or wildlife shall, if (1) such fish or wildlife was lawfully taken and exported from the country of origin and country of reexport, if any; (2) such fish or wildlife is in transit or transshipment through any place subject to the jurisdiction of the United States en route to a country where such fish or wildlife may be lawfully imported and received; (3) the exporter or owner of such fish or wildlife gave explicit instructions not to ship such fish or wildlife through any place subject to the jurisdiction of the United

States, or did all that could have reasonably been done to prevent transshipment, and the circumstances leading to the transshipment were beyond the exporter's or owner's control; (4) the applicable requirements of the Convention have been satisfied; and (5) such importation is not made in the course of a commercial activity, be an importation not in violation of any provision of this chapter or any regulation issued pursuant to this chapter while such fish or wildlife remains in the control of the United States Customs Service." 16 U.S.C.A. §1539 (i) (West 2000). "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." 16 U.S.C. A. §1532 (4) (West 2000).

230. About the interpretation of the term "taking" in section 9, see generally Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995).
231. See note 44.
232. A current report of all federally listed animals and plants as endangered or threatened species is available at the United States Fish and Wildlife Service *Threatened and Endangered Species database System (TESS),* 〈http://ecos.fws.gov/tess_public/TESSWebpage〉 .
233. "The Secretary (of the Interior) 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, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C.A. §1533 (b) (2) (West 2000).
234. "Except in those circumstances determined by the Secretary (of the Interior), critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." 16 U.S.C.A. §1532 (5) (C) (West 2000).
235. The Convention on International Trade in Endangered Species

of Wild Fauna and Flora was concluded in 1973 and came into effect in 1975. However it was not until 1980 that the Japanese government ratified the Convention. The Convention is well known as the "Washington Treaty" in Japan. The Endangered Wild Animal and Plant Trade Regulation Act (Law No.58 of 1987) was repealed on April 1, 1993, after the Endangered Species Act (Law No.75 of 1992) was enacted.

236. §1, the Endangered Species Act, Law No. 75 of 1992.
237. §1 , the Endangered Species Act, Law No. 75 of 1992.
238. §4 (3), the Endangered Species Act, Law No. 75 of 1992.
239. §4 (5), the Endangered Species Act, Law No. 75 of 1992.
240. §4 (4), the Endangered Species Act, Law No. 75 of 1992.
241. §5, the Endangered Species Act, Law No. 75 of 1992.
242. §4 (6), the Endangered Species Act, Law No. 75 of 1992.
243. §6, the Endangered Species Act, Law No. 75 of 1992. A Basic Policy to Conserve Rare Wild Animal and Plant Species was decided on November 27, 1992.
244. §9, the Endangered Species Act, Law No. 75 of 1992.
245. §10 (1), the Endangered Species Act, Law No. 75 of 1992.
246. §15 to 18, the Endangered Species Act, Law No. 75 of 1992.
247. §30, the Endangered Species Act, Law No. 75 of 1992. The person who intends to do such activities as a business must report his or her name, address, place of facility, and name of objective specie to the Minister of Government and the Minister of Agriculture, Forestry, and Fisheries in advance.
248. In other words, a habitat reservation will not be established if the Minister thinks it is not necessary. §36, the Endangered Species Act, Law No. 75 of 1992.
249. §36 (3) to (6), the Endangered Species Act, Law No. 75 of 1992.
250. §36 (4), the Endangered Species Act, Law No. 75 of 1992.
251. Hatakeyama, *supra* note 59, at 255-257.