

## Listing

### Program Overview

This program element funds the process of adding species to the list of threatened and endangered species. It also provides for the petition management process and the designation of critical habitat. Listing activities contribute to the Department's draft strategic goal of Resource Protection by working to sustain biological communities on DOI managed and influenced lands and waters. Listing a species and designating critical habitat provides species with the protections of the *Endangered Species Act (ESA)*, and focuses resources and the efforts of the Service and its partners on the recovery of the species.

Listing becomes necessary when a species declines to the point where it is at risk of extinction. The *ESA* provides that any interested person may petition to add a species to, or to remove a species from, the list of endangered and threatened species. Through the candidate assessment process, funded by the candidate conservation subactivity, the Service identifies species for candidates to list. Both the petition management and candidate assessment processes may result in a species being proposed for federal listing under the *ESA*.

The listing of species as threatened or endangered provides the species with protections under *ESA*. These include restrictions on taking, transporting, or selling a species; a requirement that federal agencies not fund, permit or undertake activities that would jeopardize the continued existence of the species; authorization for the Service to develop and carry out recovery plans; authority to purchase important habitat; and federal aid to state wildlife agencies that have cooperative agreements with the Service. Habitat is also safeguarded through the *ESA*'s section 9 prohibition on take, and through the section 7 consultation process. In a section 7 consultation, the Service looks at effects of federally funded or approved activities on the species' ability to survive. If critical habitat has been designated for a species, the Service also considers, during consultation, whether the federal activity will destroy or adversely modify critical habitat.

#### ESA DEFINITIONS

***Endangered*** - a species is in danger of extinction throughout all or a significant portion of its range.

***Threatened*** - a species is likely to become endangered within the foreseeable future.

Critical habitat is required to be designated for a species, concurrent with its listing, "to the maximum extent prudent and determinable." If the Service finds that critical habitat is "not determinable" at the time of listing, it may extend the statutory deadline by one year. To the extent that the Service finds the designation is "not prudent," no designation is required. In the past, the Service had often found that designation of critical habitat was not prudent when listing new species. However, courts have held that the prudency exception to be very narrow, which has led to a need to designate critical habitat for many already-listed species. As of the end of FY 2004, the Service estimates that there will be 101 species listed within the last 6 years for which critical habitat designations are likely to be required.

The petition management process addresses the *ESA*'s provisions that enable any interested person to petition the Secretary to either add or remove a species from the lists of threatened and endangered species. Upon receipt of a petition, the Service must respond, within 90 days when practicable, with a finding as to whether the petition provided substantial scientific or commercial information indicating that

the petitioned action may be warranted. If the Service determines the petition did not provide substantial information indicating that the action may be warranted, the 90-day finding completes the petition management process for that petition. However, if the Service determines the petition provided substantial information, the Service initiates a status review and issues a finding within 12 months of the receipt of the petition.

There are three possible outcomes of the “12-month finding”: 1) listing is not warranted, and no further action is taken; 2) listing is warranted, and a listing proposal is promptly prepared; or 3) listing is warranted but precluded by higher priority actions (this determination is based on the species’ listing priority number and the listing workload), and preparation of a listing proposal is therefore delayed until higher priority actions are completed. The Service ensures consistent and rigorous analysis of petitions by following the Petition Management Guidance issued in 1996.

Section 4 of the *ESA* has strict, non-discretionary deadlines for the processing of listing and critical habitat actions. For example, section 4(b)(6)(C) requires critical habitat to be designated at the time of listing, section 4(b)(6)(A) requires final listing rules to be promulgated no later than 12 months after the proposed rule, and section 4(b)(3)(B) requires final petition findings to be made within 12 months of a petition to list a species if a positive 90-day finding has been made.

When the Service cannot comply with a section 4 deadline, parties frequently file lawsuits under the citizen suit provision of the *ESA*. These missed deadline suits nearly always result in a court order requiring the Service to act, as courts have concluded that they have little or no discretion to give the Service relief from the mandatory deadlines of section 4 of the *ESA*. As a result, in FY 2002 the Service spent essentially all of its listing appropriation on compliance with existing court orders, litigation support, and related program management and administrative functions.

Since FY 2000, the Service’s listing program has faced a continuing situation where the amount needed to complete listing actions (primarily critical habitat designations) pursuant to section 4 litigation has been estimated at or exceeding the funding available. The Service has managed this challenging situation by appealing to various courts and negotiating with plaintiffs in an attempt to align the listing workload with the time and funding resources needed to complete such work.

In FY 2003 the Service exhausted essentially all of its FY 2003 budget for critical habitat designations by the end of July, well before the end of the fiscal year. As a result, the Service was compelled to suspend work on a number of designations that were required by court orders or settlement agreements until additional funding became available. The Service is attempting to seek relief from existing deadlines from the courts and the parties in all of the cases involving critical habitat work that the Service was compelled to suspend during FY 2003.

The program expects continued litigation in FY 2004 and 2005. The Department could face similar situations where courts order the Service to undertake activities beyond available funding. The Service intends to continue to work with all interested parties to avoid such a situation and to pursue agreements with individual plaintiffs that allow listing actions to proceed in accordance with biologically-based priorities.

### **2003 Program Performance Accomplishments**

In FY 2003, the Listing Program:

- Listed four species

- Proposed the listing of one species
- Proposed critical habitat for 30 species
- Finalized critical habitat for 389 species
- Completed four 12-month petition findings
- Completed four 90-day petition findings
- Provided litigation support on 72 suits and 35 Notices of intent to sue

Although \$6 million for critical habitat spending fully funded the original request in the President's Budget for the Listing Program for FY 2003, a number of court orders that were issued after the Service compiled its budget request dramatically increased the amount of funding needed for judicially-mandated critical habitat work. Several critical habitat actions also required a greater expenditure of resources than the Service anticipated. In a January 7, 2003, Effect Statement to the Conference managers, the Department informed Congress about these additional Listing Program requirements and the resulting shortfall for FY 2003.

The President submitted to Congress a request for a technical amendment on May 9, 2003. The technical amendment would have raised the cap on critical habitat spending for already-listed species, and allowed the Service to reprogram its funds internally to provide the Listing Program with an additional \$2,000,000. The Service would be allowed to reprogram by moving \$700,000 from its Candidate Conservation program, \$700,000 from its Consultation program, and \$600,000 from its Recovery program into the Listing Program. No action was taken on the request in FY 2003.

#### **2004 Planned Program Performance**

In FY 2004, \$12,135,000 has been appropriated for the Listing Program, of which a maximum of \$8,900,000 could be used for critical habitat designations for already listed species. Based upon estimates the Service concluded that work on the following 21 critical habitat actions for 30 species, which had court-ordered deadlines requiring critical habitat actions to be completed after July 28, 2003, should be deferred beginning in early spring for most of the actions until such time as funding became available: the Topeka shiner (FCH), Santa Ana sucker (PCH and FCH), Southwestern Arroyo toad (PCH and FCH), Riverside fairy shrimp (PCH and FCH), Lane Mountain milk-vetch (PCH), cactus ferruginous pygmy-owl (FCH), bull trout (St. Mary, Puget Sound and Jarbidge DPS) (PCH), Ventura marsh milk-vetch (FCH), bull trout (Columbia Basin/Klamath DPS) (FCH), Mexican spotted owl (PCH), La Graciosa thistle (FCH), Fish Slough milk-vetch (PCH), Eggert's sunflower (PCH), Colorado butterfly plant (PCH), spreading navarretia and San Jacinto crownscale (PCH), California red-legged frog (PCH), 9 Mobile River Basin mussels (FCH), and Cumberland elktoe and 4 Tennessee mussels (FCH).

The Service considered an alternative option of continuing to work at an uninterrupted pace on all of the critical habitat actions required by court orders and court-approved settlement agreements. If the Service had pursued that option, its projections indicated that it would exhaust all critical habitat funds sometime this past spring – significantly earlier than in the current situation after deferring work on these actions. In addition, under that scenario, the Service would have been unable to complete not only these actions, but also a number of additional actions. Thus, suspending work on a number of actions early this year enabled the Service to complete several additional actions, including a very complex and expensive designation for 56 Hawaii plant species and another action for 15 vernal pool species in California and Oregon. The Service is presenting this information to all of the courts with jurisdiction over these actions and requesting extensions of time to comply with the court orders or settlement agreements in those cases.

As of July 28, 2003, when the Service completed its work on the proposed critical habitat designation for the Peirson's milk-vetch, the Service had already spent essentially all of its FY 2003 critical habitat

funding. Once the Service submitted the Peirson's milk-vetch critical habitat rule to the Federal Register on July 28, the Service had virtually ceased all critical habitat work.

**Critical Habitat for Already Listed Species (\$8,900,000)**

Critical habitat designation contributes to the Department's draft strategic goal of Resource Protection by working to sustain biological communities on DOI managed and influenced lands and waters. Designating critical habitat for a species provides the protections of the *Endangered Species Act (ESA)*, and focuses resources and the efforts of the Service and its partners on the recovery of the species. The FY 2004 President's budget requested and Congress agreed to limit to \$8.9 million the amount of funds that could be used for critical habitat designations for already-listed species based on workload and cost estimates at the time. As of September 31, 2003, the Service had received court orders and entered into settlement agreements that would have consumed \$11.4 million, based on current estimates. This is about \$2.5 million over the President's budget.

Most of the litigation against the Service relates to the past failure to designate critical habitat when listing species. However, the Service also is seeing a rise in the number of challenges to the critical habitat designations themselves, or merits challenges. Merits challenges have often followed designations completed under extremely short, court-imposed schedules.

In FY 2004, the Service is under court order to complete the following critical habitat designations for already listed species:

- Final critical habitat designations for 29 species
- Proposed critical habitat designations for 17 species

**Other Listing Activities (\$3,235,000)**

This component of the Listing Program funds proposed and final listing rules, including any accompanying critical habitat designations, and responses to citizen petitions as well as litigation, and program support. As of December 2003, the Service estimates the 2004 costs to comply with existing court orders and settlement agreements for non-critical habitat listing actions, and the cost of litigation and program administration, and litigation support to be approximately \$3.364 million.

At the 2004 enacted level, the Service will be able to address a limited number of 90-day and 12-month findings on citizen petitions in FY 2004, however, most outstanding petitions will continue to not be addressed for the remainder of the year because of the high workload imposed by court orders, settlement agreements, and listing actions with rigid statutory deadlines. During the 2004 Fiscal Year, we project to complete the following other listing actions (estimated numbers):

- Final listing determinations for nine species
- Proposed listings for five species
- 12-month petition findings for seven species
- 90-day Petition findings for five species
- Emergency listings as necessary

Litigation Summary

As of December 15, 2003, the Service litigation workload is as follows:

- 34 active lawsuits with respect to 43 species;
- 38 court orders involving 83 species; and
- 34 notices of intent to sue involving 68 species.

**2005 Performance Goal Estimates**

For FY 2005 the Service requests \$17,226,000 for listing activities of which \$13,700,000 is for critical habitat designation. In FY 2005, the Service will continue to address the listing backlog by completing court-ordered critical habitat designations and, to the extent that discretionary funds are available, by focusing on listing actions that provide the greatest benefit for species at risk of extinction as funding allows. Court-ordered work is expected to remain at high levels.

**Justification of 2005 Program Changes**

Subactivity		2005 Budget Request	Program Changes (+/-)
Listing	\$(000) FTE	17,226 102	+5,040 +0

The FY 2005 budget request for Listing is \$17,226,000 and 102 FTE, a net program increase of \$5,040,000 and 0 FTE from the 2004 enacted level.

**Critical habitat for already listed species (+ \$4,800,000)**

The requested increase includes a total of \$13,700,000 for critical habitat for already listed species. The increased funding will allow the Service to meet its current and anticipated court orders for the designation of critical habitat for already listed species. Under current estimates, this amount will be sufficient for the Service to comply with all its outstanding court orders including those that will be deferred from FY 2004. The additional amount provides for approximately ten additional critical habitat packages to be completed. The Service anticipates that it will work on 18 final critical habitat rules, and 18 proposed critical habitat rules in FY 2005. In addition, the Service is in litigation over 20 other critical habitat designations, for which it may receive court orders for work in FY 2005.

**Other listing activities (+\$240,000)**

This requested increase includes a total of \$3,475,000 for other listing activities. This increase will support an additional 5 proposed listings, 5 final listings, eight 12-month findings and ten 90-day findings. The Service currently has court orders for three final listing determinations, six petition findings and proposed listing rules, and one critical habitat designation. In addition the Service is under litigation with respect to 15 other listing actions, and has NOIs with respect to an additional 21 listing actions.