

**Listing**

		2006 Actual	2007 CR	2008			Change from 2007 (+/-)
				Fixed Costs & Related Changes (+/-)	Program Changes (+/-)	Budget Request	
Critical Habitat	(\$000)	12,499	12,581	+345	0	12,926	+345
	FTE	80	81			81	0
Listing	(\$000)	5,131	5,178	+159	0	5,337	+159
	FTE	42	42			42	0
<b>Total, Listing</b>	<b>(\$000)</b>	<b>17,630</b>	<b>17,759</b>	<b>+504</b>	<b>0</b>	<b>18,263</b>	<b>+504</b>
	<b>FTE</b>	<b>122</b>	<b>123</b>			<b>123</b>	<b>0</b>

**Program Overview**

The Listing program funds the process of adding species to the list of threatened and endangered species. It also funds critical habitat petitions and 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 provide species with the protections of the *Endangered Species Act (ESA)*, and focus 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 or may become so in the foreseeable future. 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 provide 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.

<b>ESA DEFINITIONS</b>	
<b>Endangered</b> - a species is in danger of extinction throughout all or a significant portion of its range.	<b>Threatened</b> - 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. Courts have held the prudency exception to be very narrow, which has led to a need to designate critical habitat for many already-listed species.

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. The Service also receives a number of petitions for amendments to critical habitat and other actions. These actions are not subject to the same strict deadline as listing petitions, but they must be acted on in a timely manner. 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 or a settlement agreement 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, since FY 2000 the Service has spent essentially all of its listing appropriation on compliance with existing court orders, litigation support, and related program management and administrative functions.

#### **Use of Cost and Performance Information**

For FY 2007, the FWS has revised its allocation methodology for Listing and Critical Habitat funds to the Regions and the California/Nevada Operations Office (CNO). This workload-based allocation was redesigned to provide more transparency to the allocation process, provide a timeline process that facilitates early development and predictability of the allocation, and to distinguish between funds provided for rule-making packages at the field versus Regional Office and CNO overhead, providing a clear definition for overhead funds. This approach to the listing and critical habitat allocations ensures that our highest priority (usually court-ordered) listing actions have been funded and undertaken.

#### **2008 Program Performance**

Starting in FY 2004, the Service has seen an increase in petition litigation such that the Department approved a shift of critical habitat funds to listing funds in order to comply with our petition deadlines in 2005 and 2006. The Service was able to meet listing and critical habitat deadlines in FY 2005 and 2006 by spreading costs over 2005, 2006 and 2007 for workload that straddled fiscal years and finding

efficiencies in economic analyses and printing. The program expects continued litigation in FY 2007 and FY 2008.

The Service anticipates completion of its program to reduce the petition backlog in FY 2008, and will shift some funding toward addressing making expeditious progress on the candidate list. This will require the funding of additional listing determinations, and a reduction in the number of petition findings funded.

The Service currently has numerous listing actions which are under court orders or court-approved settlement agreements for which funding is required. The Service has 14 lawsuits concerning petition findings for 31 species; 9 lawsuits concerning the listing of 25 species; 39 lawsuits to designate critical habitat for 91 species; and 16 lawsuits on the merits of previously designated critical habitat.

#### **Critical Habitat for Already Listed Species**

The Service anticipates publishing 38 final critical habitat rules and 12 proposed critical habitat rules in FY 2008.

In FY 2007, the Service anticipates publishing 15 final critical habitat rules, and 30 proposed critical habitat rules.

#### **Other Listing Activities**

At the 2008 request level, the Service intends to address 90-day and 12-month findings on citizen petitions in FY 2008. During the 2008 Fiscal Year, we project completion of the following other listing actions (estimated numbers):

- Final listing determinations for 12 species
- Proposed listings for 8 species
- 90-day and 12-month petition findings for 25 species
- Emergency listings as necessary

At the 2007 request level, the Service intends to address 90-day and 12-month findings on citizen petitions in FY 2007. During the 2007 Fiscal Year, we project completion of the following other listing actions (estimated numbers):

- Final listing determinations for three species
- Proposed listings for twelve species
- 90-day and 12-month petition findings for 34 species
- Emergency listings as necessary

In FY 2006, through careful planning and management, the Service was able to complete this work within its available funding. Costs were spread over FY 2005/FY 2006 and the Listing/Critical Habitat program was able to identify enough efficiencies in economic analyses and printing costs to accomplish the workload. In FY 2006 the Listing Program exceeded its goals to list 5 species, finalize critical habitat for 13 species, and complete 39 listing or uplisting petition findings, while continuing to provide national and regional litigation support:

- Listed 15 species
- Finalized critical habitat for 29 species
- Completed 63 90-day and 12-month petition findings
- Provided litigation support on 42 active lawsuits, 102 actions under court compliance, and 31 Notices of Intent to Sue.