

Listing

Program Overview

Through the Listing program, the Service determines whether to add a species to the list of threatened and endangered species. The Program also processes listing and critical habitat petitions and designates critical habitat. Listing activities contribute to the Department's 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' continued existence. 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 2005, the Service estimates that there will be 60 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. 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 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.

The Service was able to meet all listing and critical habitat deadlines in FY 2004 by spreading costs over 2004 and 2005 for workload that straddled fiscal years and finding efficiencies in economic analyses and printing. Starting in FY 2004, the Service has seen an increase in the petition litigation such that we requested a shift of critical habitat funds to listing funds in order to comply with our petition deadlines in 2005 in a October 2004 Effects Statement to Conference Managers. The program expects continued litigation in FY 2005 and 2006.

2004 Program Performance Accomplishments

The Service faced a daunting workload in FY 2004. A number of court orders were issued after the Service compiled its budget request in FY 2003 that 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. The Service needed approximately \$2 million in additional funding to complete all its work. The Service ran out of funding for critical habitat designations because additional resources did not become available and so work stopped in August. Consequently, the Service was required to go back to the courts and plaintiffs to attempt to extend deadlines for about 19 packages. The Service entered FY 2004 with obligations to complete the remainder of its FY 2003 workload as well as court orders and settlement agreements with due dates in FY 2004. Through careful planning and management, the Service was able to complete this work within its available funding. Costs were spread over FY 2004/FY 2005 and the Listing/Critical Habitat program was able to identify enough efficiencies in economic analyses and printing costs to accomplish the workload.

In FY 2004, the Listing Program:

- Listed seven species
- Proposed the listing of two species
- Proposed critical habitat for 19 species
- Finalized critical habitat for 24 species
- Completed four 12-month petition findings
- Completed eight 90-day petition findings
- Provided litigation support on 76 suits and 36 Notices of intent to sue

2005 Planned Program Performance

In FY 2005, \$15,960,000 has been appropriated for the Listing Program including space reprogramming, of which a maximum of \$11,242,000 could be used for critical habitat designations for already listed species.

Critical Habitat for Already Listed Species (\$11,242,000)

Critical habitat designation contributes to the Department's 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. Congress agreed to limit 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 December 31, 2004 the Service has committed \$10.5 million of the \$11.242 million Congress provided, largely for court orders and settlement agreements.

In FY 2005, the Service is under court order to complete the following critical habitat designations for already listed species:

- Final critical habitat designations for 20 species
- Proposed critical habitat designations for 13 species

Other Listing Activities (\$4,718,000)

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 2004, the Service estimates the 2005 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 \$4.389 million.

At the 2005 enacted level, the Service will be able to address a limited number of 90-day and 12-month findings on citizen petitions in FY 2005. Due to the increased number of petition court deadlines, the Service will use all to almost all of our funds for other listing activities to meet those deadlines. During the 2005 Fiscal Year, we project completion of the following other listing actions (estimated numbers):

- Final listing determinations for six species
- Proposed listings for two species
- 12-month petition findings for six species
- 90-day Petition findings for eight species
- Emergency listings as necessary

Litigation Summary

As of January 5, 2005, the Service litigation workload is as follows:

- 34 active lawsuits with respect to 48 species;
- 40 court orders involving 88 species; and
- 36 notices of intent to sue involving 104 species.

2006 Performance Goal Estimates

For FY 2006 the Service requests \$18,130,000 for listing activities of which \$12,852,000 is for critical habitat designation. In FY 2006, 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.

Starting in FY 2004 the Service has seen an increase in the petition and listing litigation such that an increase for critical habitat and listing is requested in order to comply with deadlines. The Service has been concerned about the ability to keep up with petition and listing deadlines, given the heavy critical habitat workload.

Justification of 2006 Program Changes

Subactivity		2006 Budget Request	Program Changes (+/-)
Listing	\$(000)	18,130	+1,941
	FTE	102	-

The FY 2006 budget request for Listing is \$18,130,000 and 102 FTE, a net program increase of \$2,171,000 and 0 FTE from the 2005 enacted level.

Critical habitat for already listed species (+ \$1,458,000)

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. The Service anticipates that it will work on 23 final critical habitat rules, and 23 proposed critical habitat rules in FY 2006. In addition, the Service is in litigation over 12 other critical habitat designations, for which it may receive court orders for work in FY 2006.

Other listing activities (+\$483,000)

This requested increase includes a total of \$5,278,000 for other listing activities. This amount of funding will provide for 10 proposed listings, 10 final listing determinations, fifteen 12-month findings and ten 90-day findings. In addition the Service is under litigation with respect to 28 other listing actions, and has NOIs with respect to an additional 36 listing actions.