

# CRS Issue Brief for Congress

Received through the CRS Web

## Endangered Species: Difficult Choices

**Updated June 14, 2004**

M. Lynne Corn and Eugene H. Buck  
Resources, Science, and Industry Division

Pamela Baldwin  
American Law Division

# **CONTENTS**

SUMMARY

MOST RECENT DEVELOPMENTS

BACKGROUND AND ANALYSIS

Overview

Prohibitions and Penalties

Listing

Critical Habitat

Recovery Plans

Land Acquisition and Cooperation

Permits

Exemptions; Emergencies

Miscellaneous

Major Provisions of Current International Law

Issues in the 108th Congress

Critical Habitat Designation

Use of “Sound Science”

Specific Regional Resource Conflicts

Counterpart Regulations

Defense Department Activities

Private Property and Takings

Making the ESA More User-Friendly

Additional Legislative Initiatives

Appropriations Issues

## Endangered Species: Difficult Choices

### SUMMARY

The 108<sup>th</sup> Congress is considering various proposals to amend the Endangered Species Act of 1973 (ESA). Major issues in recent years have included incorporating further protection for property owners, increasing protection of listed species, changing the role of science in decision-making, reducing conflicts with Department of Defense activities, and changing the role of critical habitat, among others. The Clinton Administration made significant changes to ESA regulations, and many have advocated including these approaches in the law itself.

The ESA has been one of the more contentious environmental laws. This may stem from its strict substantive provisions, which can affect the use of both federal and nonfederal lands. Under the ESA, certain species of plants and animals (both vertebrate and invertebrate) are listed as either “endangered” or “threatened” according to assessments of the risk of their extinction. Once a species is listed, powerful legal tools are available to aid the recovery of the species and the protection of its habitat. The ESA may also be controversial because dwindling species are usually harbingers of resource scarcity issues.

The ESA is administered by the Fish and Wildlife Service (FWS) for terrestrial and freshwater species and some marine mammals, and by NOAA Fisheries for the remaining marine and anadromous species. The U.S. Geological Survey’s Biological Resources Division conducts research on species for which FWS has management authority; NOAA Fisheries conducts research on the species for which it is responsible.

The authorization for spending under the ESA expired on October 1, 1992. The prohibitions and requirements of the ESA remain in force, even in the absence of an authorization, and funds have been appropriated to implement the administrative provisions of the ESA in each subsequent fiscal year.

In the 108<sup>th</sup> Congress, P.L. 108-108 provided FY2004 Interior appropriations of \$265 million for programs related to endangered species. P.L. 108-136 amended the ESA to direct that critical habitat not be designated on military lands under certain conditions when Integrated Natural Resources Management Plans are in effect, addressed how water consumption at Fort Huachuca, AZ, is to be considered under the ESA, and created a task force to resolve ESA conflicts at Barry M. Goldwater Range, AZ.

P.L. 108-137 prohibited use of FY2004 or earlier funds to reduce water deliveries under existing contracts for ESA compliance for the silvery minnow on the Middle Rio Grande River unless water is obtained from a willing seller or lessor. The Act also established an executive committee to oversee the ESA Collaborative Program associated with this situation. P.L. 108-148 authorized hazardous fuels reduction projects on BLM and national forest lands including those containing listed species habitat; directed that a healthy forests reserve program be established to promote the recovery of threatened and endangered species; and directed the Secretary of the Interior to provide assurances to landowners whose enrollment in the healthy forests reserve program results in new conservation benefits for ESA-listed species.



## **MOST RECENT DEVELOPMENTS**

On February 2, 2004, the Administration requested FY2005 funding for various federal agencies and programs, including \$289 million for Endangered Species Act activities by the Fish and Wildlife Service.

## **BACKGROUND AND ANALYSIS**

### **Overview**

The 1973 ESA (16 U.S.C. §1531-1543; P.L. 93-205, as amended) is a comprehensive attempt to protect species at risk of extinction and to consider habitat protection as an integral part of that effort. Under the ESA, species of plants and animals (both vertebrate and invertebrate) may be listed as either “endangered” or “threatened” according to assessments of the risk of their extinction. More flexible management can be provided for species listed as threatened. Distinct population segments of vertebrate species may also be listed as threatened or endangered, and consequently some populations of chinook, coho, chum, and sockeye salmon in Washington, Oregon, Idaho, and California are protected under the ESA, even as other healthy populations of these same species in Alaska are not listed and can be commercially harvested. More limited protection is available for plant species under the ESA. Once a species is listed, powerful legal tools, including penalties and citizen suit provisions, are available to aid the recovery of the species and the protection of its habitat. Use of these tools, or the failure to use them, has led to conflict. For more background information on the ESA, see CRS Report RL31654, *The Endangered Species Act: A Primer*, by Pamela Baldwin, Eugene H. Buck, and M. Lynne Corn.

As of June 4, 2004, a total of 1,074 species of animals and 749 species of plants had been listed as either endangered or threatened, of which the majority (519 species of animals and 746 species of plants) occur in the United States and its territories and the remainder only in other countries. Of the 1,265 U.S. species (up 3 since Dec. 31, 2002), 1,023 are covered in recovery plans (up 23 since Dec. 31, 2002). (See the Fish and Wildlife Service (FWS) at [<http://endangered.fws.gov/>] and the National Marine Fisheries Service (NOAA Fisheries, formerly NMFS) at [<http://www.nmfs.noaa.gov/endangered.htm>].)

At times, efforts to protect and recover listed species can be controversial; declining species tend to function like the proverbial canary in the coal mine, since declining species flag larger issues of resource scarcity and altered ecosystems. Past resource debates in which ESA-listed species were part of larger issues include Tennessee’s Tellico Dam (water storage and construction jobs versus farmland protection and tribal graves, as well as snail darters); Pacific northwest timber harvest (protection of logging jobs and communities versus commercial and sport fishing, recreation, and ecosystem protection, as well as salmon and spotted owls); and Texas’s Edwards Aquifer (allocation of water among various users with differing short- and long-term interests, as well as several spring-dependent species). Major features of the Act are discussed below.

**Prohibitions and Penalties.** The ESA contains prohibitions on the “take” of endangered species; *take* means to “harass, harm, pursue, hunt, shoot, wound, kill, trap,

capture, or collect or attempt to engage in any such conduct” (16 U.S.C. §1532; harassment and harm are further defined in regulation at 50 CFR 17.3). There has been controversy over the extent to which habitat modification is prohibited. A 1995 Supreme Court decision held that the inclusion of significant habitat modification was a reasonable interpretation of the term “harm” in the ESA. (See CRS Report 95-778 A, *Habitat Modification and the Endangered Species Act: The Sweet Home Decision*.) The law also provides civil and criminal penalties for violations.

**Listing.** Species may be listed on the initiative of the appropriate Secretary or by petition from an individual, group, or state agency. The Secretary must decide whether to list the species based only on the best available scientific and commercial information, after an extensive series of procedural steps to ensure public participation and the collection of information. In deciding whether a species needs the protections of the ESA, the Secretary may not take into account the economic effects that listing may have; economic and other considerations are taken into account in structuring alternatives for assisting the species after listing. (See CRS Report RL30792, *The Endangered Species Act: Consideration of Economic Factors* by Pamela Baldwin, for an analysis of when and how the ESA allows consideration of economic factors.)

**Critical Habitat.** With certain exceptions, if a species is listed, the appropriate Secretary must designate critical habitat (CH) — areas where the species is currently found or which might provide additional habitat for the species’ recovery. However, if the publication of this information is not “prudent” because it could harm the species (e.g., by encouraging vandals or collectors), the appropriate Secretary may decide not to designate CH. FWS designates CH for only about one-third of listed domestic species. The appropriate Secretary may postpone designation for up to one year if the information is not determinable (16 U.S.C. §1533).

As a practical matter, CH has not been designated for many listed species in large part because FWS prefers to allocate scarce resources to the listing of new species, based on its interpretation of a regulation (50 CFR 402.02) that takes away the value of designating habitat to the recovery of a listed species; yet FWS consistently loses cases brought against it for failure to designate CH. FWS asserts that CH offers little protection for a species beyond that already available to any listed species and is a poor use of scarce budgetary resources. However, courts have found this interpretation to be unlawful in that it does not take into account the responsibility to recover listed species (*Sierra Club v. United States Fish and Wildlife Service*, 245 F. 3d 434 (5<sup>th</sup> Cir. 2001), cited with approval in *New Mexico Cattle Growers Ass’n v. FWS*, 248 F. 3d 1277 (10<sup>th</sup> Cir. 2001)). Others assert the value of CH; for example, the Center for Biological Diversity has released a study (available at [<http://www.biologicaldiversity.org/swcbd/programs/policy/ch/Final.htm>]) concluding that CH designation enhances species recovery. See CRS Report RS20263, *The Role of Designation of Critical Habitat under the Endangered Species Act*, by Pamela Baldwin.

According to FWS, CH designation shows its greatest conservation benefit when it includes areas not currently occupied by the species; these areas may be important as connecting corridors between populations or as areas where the species may be re-introduced. CH is frequently misunderstood by the public to be a significant direct restriction on private landowners’ authority to manage land. While a landowner may experience some restrictions on land management because of the presence of an ESA-listed

species (through the ESA's prohibitions on "taking" a listed species) and the presence of CH may shed light on whether "harm" has occurred, the duty to avoid adverse modification of CH is an express obligation only for federal agencies and actions, or private (nonfederal) actors in actions with a federal nexus.

**Recovery Plans.** The appropriate Secretary generally must develop a recovery plan for the conservation and survival of a listed species. At first, recovery plans tended to cover popular species like birds or mammals, but a 1988 amendment forbade the Secretary from favoring particular taxonomic groups (16 U.S.C. §1533). The ESA and its regulations provide little detail on the requirements for recovery plans; these plans are not binding on federal agencies or others.

**Land Acquisition and Cooperation.** The federal government may acquire land to conserve (recover) listed species, and money from the Land and Water Conservation Fund may be appropriated for this acquisition (16 U.S.C. §1534). The appropriate Secretary must cooperate with the states in conserving protected species and must enter into cooperative agreements to assist states in their endangered species programs, if the programs meet certain specified standards. If there is a cooperative agreement, the states may receive federal funds to implement the program, but the states must normally provide a minimum 25% match. Under the 1988 amendments, a fund was authorized to provide for the state grants. While the authorized size of the fund is determined by a formula, spending from the fund still requires annual appropriation (16 U.S.C. §1535).

**Permits.** Proposed actions can be evaluated for possible adverse impacts on listed species and permits may be issued in two ways. First, under §7 of the ESA, if federal agency actions or actions of a nonfederal party that require an agency's approval, permit, or funding may affect a listed species, the federal agency must ensure that those actions are "not likely to jeopardize the continued existence" of any endangered or threatened species, nor to adversely modify CH. To review the possible effects of their actions on listed species and CH, federal agencies must consult with the appropriate Secretary. If the Secretary finds that an action would jeopardize a listed species or adversely modify CH, the Secretary must suggest reasonable and prudent alternatives that would avoid these harms. Pending completion of the consultation process, agencies may not make irretrievable commitments of resources that would foreclose any alternatives. The Secretary may issue a written statement, called a *biological opinion*, that allows the agency to take members of a species incidental to otherwise lawful activities without triggering the Act's penalties, subject to terms and conditions specified in the statement (16 U.S.C. §1536).

For actions without a federal nexus (i.e., no federal funding, permit, or license), the appropriate Secretary may issue permits under § 10 of the ESA to allow the *incidental take* of species during otherwise lawful actions. An applicant for a permit must submit a habitat conservation plan (HCP) that shows the likely impact of the planned action; steps to be taken to minimize and mitigate the impact; funding for the mitigation; alternatives that were considered and rejected; and any other measures that the Secretary may require. FWS and NOAA Fisheries have vastly expanded use of this section and provided streamlined procedures for activities with minimal impacts (16 U.S.C. §1539).

**Exemptions; Emergencies.** Proponents of a federal action may apply for an exemption from §7(a)(2) of the ESA for *that action* (not for a species). Under the ESA, a

Committee (commonly called the “God Squad”) of six specified federal officials and a representative of each affected state must decide whether to allow a project to proceed despite future harm to a species; at least five votes are required to pass an exemption. To date, this process has been little used and only one exemption (Grayrocks Dam, WY) has been granted and carried out. The Committee is required to accept the President’s determination (under specified circumstances) on an exemption in declared disaster areas, but the ESA does not address other emergency actions or situations. The Committee must also grant an exemption if the Secretary of Defense determines that an exemption is necessary for national security (16 U.S.C.§1536). To date, no security exemption has been sought.

**Miscellaneous.** Other provisions specify certain exemptions for raptors; regulate subsistence activities by Alaskan Natives; prohibit interstate transport and sale of listed species and parts; control trade in parts or products of endangered species owned before the ESA went into effect; and specify rules for establishing experimental populations (16 U.S.C.§1539).

**Major Provisions of Current International Law.** For the United States, the ESA implements the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES; TIAS 8249), signed by the United States on March 3, 1973; and the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (the Western Hemisphere Convention; 50 Stat. 1354; TS 981), signed by the United States on October 12, 1940. CITES parallels the ESA by dividing its listed species into groups, according to the estimated risk of extinction, but uses three major categories (called *Appendices*), rather than two. In contrast to the ESA, CITES focuses exclusively on trade and does not consider or attempt to address habitat loss. (For more information on CITES, see [<http://www.cites.org/>].) The ESA makes violations of CITES violations of U.S. law if committed within the jurisdiction of the United States (16 U.S.C.§1538). The ESA also regulates import and export of controlled products and provides some exceptions. The 13<sup>th</sup> regular meeting of CITES parties will be held October 3-14, 2004, in Bangkok, Thailand. On August 18, 2003, FWS published a draft policy for enhancement-of-survival permits for foreign species listed under the ESA (68 *Fed. Reg.* 49512).

## Issues in the 108th Congress

ESA reauthorization has been on the legislative agenda since the funding authorization expired in 1992, and bills have been introduced in each subsequent Congress to address various aspects of endangered species protection. Below are descriptions of some of the issues most commonly raised in the 108<sup>th</sup> Congress.

**Critical Habitat Designation.** With limited exceptions, FWS or NOAA Fisheries must designate CH at the time a species is listed. There are disagreements over the value and timing of CH designation. (See Critical Habitat discussion, above.) The Clinton Administration, through appropriations bills, supported restrictions on its own ability to designate CH under the ESA, as has the George W. Bush Administration. (See *ESA Listing Caps, New and Old*, below.)

In the 108<sup>th</sup> Congress, various bills (e.g., H.R. 2602 and H.R. 2933) on CH have been introduced, but to date no hearings have been held. For military lands specifically, P.L. 108-

136 eliminates new CH designations if the lands have Integrated Natural Resource Management Plans that “benefit species.” (See CRS Report RL32183, *Defense Cleanup and Environmental Programs: Authorization and Appropriations for FY2004*, by David M. Bearden; and CRS Report RL31415, *The Endangered Species Act (ESA), Migratory Bird Treaty Act (MBTA), and Department of Defense (DOD) Readiness Activities: Background and Current Law*, by Pamela Baldwin.)

**Use of “Sound Science”.** The ESA was enacted to conserve listed species — to bring them to the point where they do not need the special protections of the ESA — and one of its stated purposes is to provide a means to conserve the ecosystems on which listed species depend. The ESA, as amended, requires that decisions to list a species be made “solely on the basis of the best scientific and commercial data available ....” There is no elaboration on the meaning of the latter part of this phrase in the law itself or in FWS regulations, but there is some legislative history on the phrase (see CRS Report RL31654, *The Endangered Species Act: A Primer*, by Pamela Baldwin, Eugene H. Buck, and M. Lynne Corn).

In many instances, there may be little information on many species facing extinction, and only limited personnel or funds available to conduct studies on many of the less charismatic species, or those of little known economic import. What should be done in such instances? The ESA does not elaborate on this question, but it could be argued that, combining the protective purpose of the ESA — to save and recover species — with the wording of “best ... data *available*,” arguably dwindling species should be given the benefit of the doubt and a margin of safety permitted. This is the position taken in the *FWS Handbook* at pp. 1-6, which states that efforts should be made to develop information, but if a biological opinion must be rendered promptly, it should be based on the available information, “giving the benefit of the doubt to the species,” with consultation possibly being reinitiated if additional information becomes available. This phrase is drawn from H.Rept. 96-697, p. 12 (1979), which stated that the “best information available” language was intended to allow FWS to issue biological opinions even when information was incomplete, rather than being forced to issue negative opinions. But the report also states that if a biological opinion is rendered on the basis of inadequate information, the federal agency proposing an action has the duty to show its actions will not jeopardize a species and a continuing obligation to make a reasonable effort to develop information, and that the statutory language “continues to give the benefit of the doubt to the species.”

FWS and NOAA Fisheries developed a joint policy on Information Standards Under the Endangered Species Act (59 *Fed. Reg.* 34271 (July 1, 1994)) that might provide useful information on this issue. Under this policy, FWS and NOAA Fisheries are to receive and use information from a wide variety of sources, including from individuals. Information may range from the informal — oral, traditional, or anecdotal — to peer-reviewed scientific studies, and hence the reliability of the information can also be variable. Agency biologists are to review and evaluate all information impartially for purposes of listing, consultation, recovery, and permitting actions, and to ensure that any information used by the Agencies to implement the ESA is “reliable, credible, and represents the best scientific and commercial data available.” Agency biologists are to document their evaluations of all information and, to the extent consistent with the use of the best scientific and commercial data available, use primary and original sources of information as the basis of recommendations. In addition,



documents developed by Agency biologists will be reviewed to “verify and assure the quality of the science used to establish official positions, decisions, and actions ....”

Another joint policy notes that in addition to the public comments received on proposed listing rules and draft recovery plans, the Services are also to formally solicit expert opinions and peer review to ensure the best biological and commercial information. For listing decisions, the Agencies are to solicit the expert opinions of three specialists and summarize these in the record of final decision. Special independent peer review can also be used when it is likely to reduce or resolve an unacceptable level of scientific uncertainty (59 *Fed. Reg.* 34270 (July 1, 1994)).

Courts that have considered the “best data available” language have held that an agency is not obliged to conduct studies to obtain missing data (*Southwest Center for Biological Diversity v. Babbitt*, 215 F. 3d 58 (D.C. Cir. 2000)), but cannot ignore available biological information (*Connor v. Burford*, 848 F. 2d 1441 (9<sup>th</sup> Cir. 1988)), especially if the ignored information is the most current (*Southwest Center for Biological Diversity v. Babbitt*, 926 F. Supp. 920 (D.C. Ariz. 1996)). Nor may an agency treat one species differently from other similarly-situated species (*Id.*), nor decline to list a dwindling species and wait until it is on the brink of extinction in reliance on possible but uncertain future actions of an agency (*Biodiversity Legal Foundation v. Babbitt*, 943 F. Supp. 23 (D. D.C. 1996)). “Best scientific and commercial data available” is not a standard of absolute certainty, reflecting Congress’ intent that FWS take conservation measures before a species is conclusively headed for extinction (*Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 679-680 (D. D.C. 1997)). If FWS does not base its listings on speculation or surmise or disregard superior data, the imperfection of the studies it does rely on does not undermine those studies as the best scientific data available — “the Service must utilize the best scientific ... data *available*, not the best scientific data *possible*” (*Building Industry Ass’n of Sup. Cal. v. Norton*, 247 F. 3d 1241, 1246-1267 (D.C. Cir. 2001), *cert. denied* 2002 U.S. LEXIS 479).

On the other hand, the availability of judicial review can help ensure that agency decisions and their use of scientific data are not “arbitrary or capricious” and that regulations are rationally related to the problems causing the decline of a species, especially in situations when other interests are adversely affected. (See *Connor v. Andrus*, 453 F. Supp. 1037 (W.D. TX. 1978), striking down regulations totally banning duck hunting in an area in order to protect one listed species of duck.) Another court stated that the evidentiary bar FWS must clear is very low, but it must at least clear it. In the context of issuance of Incidental Take Permits under §10(a), this means the agency must demonstrate that a species is or could be in an area before regulating it, and must establish the causal connection between the land use being regulated and harm to the species in question. Mere speculation as to the potential for harm is not sufficient (*Arizona Cattle Growers Association v. United States Fish and Wildlife Service*, 273 F. 3d 1229 (9<sup>th</sup> Cir. 2001)).

In the 108<sup>th</sup> Congress, a number of bills (e.g., S. 369, H.R. 1097, H.R. 1253, H.R. 1662, S. 2009) to amend the ESA and its handling of scientific matters have been introduced, but to date none has been reported. For more information on this issue, see CRS Report RS21500, *The Endangered Species Act (ESA), ‘Sound Science,’ and the Courts*, by Pamela Baldwin, and CRS Report RL31546, *The Endangered Species Act and Science: The Case of Pacific Salmon*, by Eugene H. Buck, et al.

**Specific Regional Resource Conflicts.** One of the express purposes of the ESA is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” (16 U.S.C. §1531(b)). As open space dwindles and an increasing population puts pressures on our natural resources, the conservation of species and their habitats may highlight underlying resource and economic conflicts. Public values and affected economic interests may be complex and sometimes conflicting. The situations described below have been the subject of congressional oversight and legislative interest.

**Klamath River Basin.** Controversy erupted in 2001 when the Department of the Interior’s Bureau of Reclamation (Bureau) announced it would not release water from Upper Klamath Lake — part of its Klamath irrigation project — to approximately 200,000 acres of farm and pasture lands within the roughly 235,000-acre project service area. The operational change was made to make water available for three fish species under ESA protection (two endangered sucker species, and a threatened coho salmon population). The Klamath Project straddles the Oregon/California border and has been the site of increasingly complex water management issues involving several tribes, fishermen, farmers, environmentalists, and recreationists. Upstream farmers are generally pitted against fishermen, Native American interests, and other downstream users, and many sides have policy concerns involving valuable sectors of the local economy. Farmers point to their contractual rights to water deliveries from the federal Klamath Project and to hardships for their families if water is cut off; others assert that the salmon fishery is more valuable and that farmers could be provided temporary economic assistance, while salmon extinction would be permanent. Still others assert that there are ways to serve all interests, or that the science underlying the determinations of the relevant agencies is simply wrong. Specifically at issue is how to operate the Bureau’s project facilities to meet irrigation contract obligations without jeopardizing the three listed fish.

To address this issue, the Bureau issued a 10-year operations plan in February 2002 and a biological assessment (a process necessary under the ESA) for operating its Klamath Project. However, subsequent biological opinions found that the Bureau’s 10-year operations plan would likely jeopardize the continued existence of the listed suckers and coho salmon, as well as adversely modify proposed critical habitat. Although the biological opinions issued on May 31, 2002, by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (now called NOAA Fisheries) both included “reasonable and prudent alternatives,” the Bureau formally rejected both final biological opinions and opted to operate under a one-year plan that it asserts complies with the opinions. While met with enthusiasm from area farmers, the Bureau’s decision was met with much criticism and concern from environmentalists, fishermen, tribes, and others. On April 10, 2003, the Bureau issued its Klamath Project 2003 operations plan and noted that planning for multi-year operations of the project is ongoing; on April 7, 2004, the Bureau issued its 2004 operations plan. In both years, the Bureau states that the current year plan is consistent with the 2002 biological opinions. The ESA agencies (FWS and NOAA Fisheries) have not issued a biological opinion on the one-year operations plans and instead are working within the biological opinions released in May 2002.

Because of the controversy in 2001, the Secretary of the Interior asked the National Research Council (NRC) to evaluate the federal biological opinions that had been used to prevent the Bureau from delivering water to farmers in 2001. The NRC released an interim

report in February 2002, and a final report in October 2003, both of which concluded there was neither sound scientific basis for maintaining Upper Klamath Lake levels and increased river flows as recommended in the 2001 biological opinions, nor sufficient basis for supporting the lower flows in the Bureau's original operations plan for 2001. Further, the NRC concluded (1) that recovery of endangered suckers and threatened coho salmon in the Klamath Basin might best be achieved by broadly addressing land and water management concerns and (2) that the operation of the Klamath Project (as opposed to operation of other basin projects such as that on the Trinity River) was not the cause of a 2002 lower basin fish kill and that changes in project operation at the time of the fish kill would not have prevented it.

In the 108th Congress, H.R. 1760 would establish water conservation and habitat restoration programs in the Klamath River Basin and provide emergency disaster assistance to those who suffered economic harm from the Klamath River Basin fish kill of 2002. A prohibition on Interior Department funding for the Klamath Fishery Management Council was included in the FY2004 Interior Appropriations bill, passed by the House on July 17, 2003, but was deleted in conference (H.R. 2691, H.Rept. 108-330). It is not clear whether the Bureau's recent announcement of a "dry" water year for the 2004 growing season will spawn further congressional action.

**Salmon Restoration.** Salmon protection in the Pacific Northwest in general presents many difficult choices, especially because of recent droughts and the connection between regional hydropower facilities and fishery management decisions. NOAA Fisheries officials have listed a total of 26 distinct groups (called *evolutionarily significant units* or ESUs) of Pacific salmon and steelhead trout as either threatened or endangered. NOAA Fisheries officials are working closely with state, local, and tribal officials, as well as the public, to develop recovery measures addressing habitat restoration and other concerns. A final Federal Columbia River Power System biological opinion was released on December 21, 2000, that concluded that four Lower Snake River dams should remain in place for at least eight years, to allow for a more complete assessment of progress toward recovering endangered salmon, but this opinion was rejected and remanded to NOAA Fisheries by a federal court in May 2003.

Another case may have widespread significance on salmon listings. In *Alesea Valley Alliance v. Evans* (161 F. Supp. 2d 1154 (D. Or. 2001)), Judge Hogan remanded the listing of the Oregon Coast ESU of coho salmon as a threatened species, finding the listing to have been arbitrary and capricious under the Administrative Procedure Act. The ESA permits listing of a species, subspecies, or *distinct population segment*. This allows some species such as wolves to be listed in an area (the lower 48 states) even if a viable population exists elsewhere (e.g., Alaska). NOAA Fisheries had clarified in a policy statement what was meant by distinct population segment in the context of certain fish, equating *distinct population segment* with an *evolutionary significant unit* (56 Fed. Reg. 58612 (Nov. 20, 1991)). An ESU is a population that is "substantially reproductively isolated from other conspecific population units" and represents "an important component in the evolutionary legacy of the species" (56 Fed. Reg. 58618). However, the NOAA Fisheries policy on hatchery fish (58 Fed. Reg. 17573 (Apr. 5, 1993)) states that a hatchery population will not be considered part of an ESU if: (1) the hatchery population is of a different genetic lineage than natural populations; (2) artificial propagation has produced appreciable changes in the characteristics of a hatchery population that are believed to have a genetic basis; or (3) there

is substantial uncertainty about the relationship between existing hatchery fish and the natural population (58 *Fed. Reg.* 17575).

The judge felt NOAA Fisheries erred in the coho salmon policy by including hatchery fish as within the coho ESU — as though the hatchery fish were genetically identical to naturally hatched fish in the same water source — but *not* counting the same hatchery fish when deciding whether to list the coho ESU. The court concluded that, *in this instance*, not considering the hatchery fish when making the listing decision was arbitrary and created a further distinction (hatchery-spawned vs. identical non-hatchery fish) below the level of distinct population segment, which the agency lacked authority to do. The court did not rule on whether genetically different hatchery fish could be excluded from an ESU altogether.

Although the United States did not appeal this decision, intervening parties appealed, and the 9<sup>th</sup> Circuit blocked implementation of the lower court decision until appellate proceedings are completed, thereby leaving the coho listing in place. The 9<sup>th</sup> Circuit on February 24, 2004 (358 F. 3d 1181) dismissed the appeal on procedural grounds, but the stay apparently remains in place until a final order is issued, at which time it apparently will be lifted. NOAA Fisheries indicated it would develop a new policy on hatchery fish, but to date has issued only a draft policy. Numerous petitions to delist other salmon ESUs have been filed, but no final actions have been taken and NOAA Fisheries has requested an extension to rule on the petitions in litigation on this issue. Whether courts will approve the current policy that permits excluding from an ESU hatchery fish from a dissimilar genetic lineage, or whether a new policy will be promulgated is not yet clear, but either course could have implications for salmon listings in general.

In the 108<sup>th</sup> Congress, H.R. 1945 would authorize the Secretary of Commerce to provide financial assistance to states for salmon habitat restoration projects in coastal waters and upland drainages; this bill was reported (amended) by the House Committee on Resources on September 16, 2003 (H.Rept. 108-272). On June 24, 2003, the Senate Environment and Public Works Subcommittee on Fisheries, Wildlife, and Water held a hearing on the NOAA Fisheries' 2000 Biological Opinion for ESA-listed anadromous fish as it affects operation of the federal Columbia River power system.

***Rio Grande Silvery Minnow.*** Efforts to conserve water necessary for the Rio Grande silvery minnow from competing New Mexico water users (primarily the city of Albuquerque and irrigators) have ignited considerable controversy. At issue is the operation of two BOR water projects on the Middle Rio Grande: the San Juan-Chama Project and the Middle Rio Grande Project. Conservation groups have asserted that BOR's operations on the middle Rio Grande jeopardize the continued existence of the endangered silvery minnow, in violation of the ESA. BOR, on the other hand, claimed that existing water delivery contracts precluded the use of already appropriated water for the endangered fish. After years of litigation, the New Mexico District Court ultimately disagreed with BOR and found that withholding water from irrigators for ESA-related purposes was permissible under the water contracts at issue. This decision was later affirmed by the Tenth Circuit in *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10<sup>th</sup> Cir. 2003). The circuit court held that BOR had discretion under the contracts to reduce water deliveries to contractors to comply with ESA-related purposes. Although the decision affirmed "a narrowly drawn order addressing carefully limited circumstances" (*Rio Grande Silvery Minnow*, 333 F.3d at 113-14), some

may argue that this decision could have far reaching implications and affect other BOR projects.

The 108<sup>th</sup> Congress took action soon after the Tenth Circuit's ruling. On September 6, 2003, the House Committee on Resources held a field oversight hearing in Belen, NM, on the silvery minnow's impact on New Mexico. In December 2003, Congress passed the Energy and Water Development Appropriations Act of 2004 (P.L. 108-137). Section 208 of the Act prohibits the use of FY2004 or earlier fiscal year funds to reduce water deliveries under existing contracts for the purpose of ESA compliance in the Middle Rio Grande except through a willing sale or lease by a party otherwise entitled to such water. Section 209 establishes an executive committee to oversee the ESA Collaborative Program associated with this complex situation. The language in P.L. 108-137 was cited by some as being the first successful legislative override of federal requirements in the ESA's 30-year history. (Others might cite the override concerning Tellico Dam and the snail darter which preceded this override by 25 years.) Still, the passage of this legislation does not necessarily affect the precedential value, if any, of the Tenth Circuit's decision. To date, legislation affecting operations in the Middle Rio Grande (S. 997 and H.R.2982) has been introduced, but no hearings have been held.

**Counterpart Regulations.** On January 24, 2003 (68 *Fed. Reg.* 3786), the Departments of the Interior and Commerce, and the U.S. Environmental Protection Agency (EPA) issued an advance notice of proposed rulemaking seeking comments on whether and how to issue *counterpart regulations*, whereby new procedures would be authorized for the EPA to integrate their consultation duties under §7 of the ESA with the regulation of pesticides by that agency. Counterpart regulations are authorized by 50 CFR §402.04, which states that such regulations have to be proposed and published with a public comment period of at least 60 days. If finalized, the regulations supersede the usual consultation regulations. Until recently, no counterpart regulations had been issued, so the validity of §402.04 has not been tested in the courts.

New counterpart pesticide regulations were proposed on January 30, 2004 (69 *Fed. Reg.* 4465), under which EPA personnel would be trained to make the determination that a Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) action was not likely to adversely affect listed species, without formal or informal consultation or a written concurrence from FWS or NOAA Fisheries. New §402.46 would establish an alternative formal consultation process for FIFRA actions whereby the EPA would prepare the effects determination, with or without input from FWS, and "may" initiate consultation on the action. If consultation is initiated, there are provisions for interaction regarding information and the development of a final biological opinion. Proposed §402.47 would provide for successive effects determinations in complex FIFRA actions.

Counterpart regulations were finalized December 8, 2003 (68 *Fed. Reg.* 68254), among the Forest Service, the Bureau of Land Management, the Bureau of Indian Affairs, the National Park Service, FWS, and NOAA Fisheries, relating to streamlining consultation on projects supporting the National Fire Plan. A 60-day Notice of Intent to Sue was filed by various groups to challenge the regulations, and a suit is expected when that time has run.

**Defense Department Activities.** The events of September 11, 2001, focused attention not only on the CH issues previously discussed, but also on all statutes that might

impinge on military training activities. The ESA allows for an automatic exemption for activities involving national security, but an exemption has never been sought on this basis, there are no regulations that elaborate on it, and little information is available as to how it might apply in practice. It is, however, worded as an exemption for an individual action of an agency and must be granted by the high-level committee (“God Squad”) assembled to consider exemptions. The Act also requires the consideration of the impacts on national security when critical habitat is designated. See CRS Report RL31415, *The Endangered Species Act (ESA), Migratory Bird Treaty Act (MBTA), and Department of Defense (DOD) Readiness Activities: Background and Current Law*, by Pamela Baldwin.

Under §7 of the ESA, the “reasonable and prudent alternatives” that FWS may suggest to an agency as part of consultation must be ones that “can be taken” by the agency. A regulation (50 CFR §402.02) elaborates on this requirement as being measures that are economically and technologically feasible and “that can be implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction.” In a case involving water use by the Army at Fort Huachuca, the final biological opinion of FWS required the Army to take actions allegedly beyond its authority (although the court noted that the Army had voluntarily agreed to do similar things in a memorandum of agreement). However, the court remanded the final opinion because of other flaws, so the extent to which actions beyond the authority of the Army to complete would actually have been required is not known. Section 321 of P.L. 108-136 addressed how water consumption at Fort Huachuca, Arizona, is to be considered under the ESA; and §322 created a task force to resolve ESA conflicts at Barry M. Goldwater Range, AZ. For additional information, see section on ESA in CRS Report RL32183, *Defense Cleanup and Environmental Programs: Authorization and Appropriations for FY2004*, by David M. Bearden.

**Private Property and Takings.** Some landowners fear that the presence of a listed species or the designation of their land as CH will result in restrictions on current or new activities on their land with subsequent loss of some or all of their property value. At the other end of the spectrum, there are those, particularly in the Northeast and Midwest, who value the presence of a rare flower or frog on their land.

Under the Constitution, a person’s property cannot be taken by the government without “just compensation,” whether the taking occurs under the ESA or any other federal law. In the past, *taking* has been strictly interpreted by the courts and has not included restrictions on permitted uses or a decrease in the value of the land, unless the constraints are very severe and the prohibited uses could not have been barred at the time the property was acquired. The U.S. Court of Federal Claims ruled (in *Tulare Lake Basin Water Storage District, et al. v. United States*, 49 Fed. Cl. 313 (2001)) that water could not be taken from certain California irrigators to benefit endangered fish unless compensation was provided. However, the outcome of this case rests on facts that may not be present in other instances, including the particular language in the water delivery contracts, so the value of the case as precedent is not yet clear. Liability for a taking was not reconsidered by the appeals court, which dealt only with compensation (59 Fed. Cl. 246 (2003)).

Critics of the ESA would like to see it amended to provide compensation in a broader range of circumstances than those required under the Constitution. These critics generally propose that compensation be offered for some specified percentage decrease in the value of property owners’ assets (including losses related to use of their land), since they feel that

property owners are otherwise being forced to bear the cost of a public benefit. Such provisions have been included in several bills introduced in previous Congresses; proponents usually include Fifth Amendment takings under the Clean Water Act (§404), but not takings pursuant to other national interests (e.g., homeland security, highway construction).

Opponents of a revised “taking” standard counter that they do not wish to see the ESA singled out as having a different, more generous standard for compensation than that required under current interpretation of the Constitution or for any other agency or law. They further state that the rights of property owners to use their land have never been absolute, and that regulation in the public interest (e.g., zoning) has long been accepted. The cost to the federal government from changed thresholds for compensation and the constraints that would likely be placed on the implementation of the ESA under a more lenient takings standard are among the contentious issues slowing action on ESA reauthorization. (See also CRS Report RL31796, *The Endangered Species Act and Claims of Property Rights ‘Takings’: A Summary of the Court Decisions*, by Robert Meltz.) However, both proponents and opponents of the ESA favor enacting incentives (primarily tax benefits) to encourage landowner cooperation. In the 108<sup>th</sup> Congress, §204 of H.R. 7 proposes to exclude landowner incentive payments under ESA §6 from gross income for tax purposes; H.R. 7 was reported (amended) by the House Committee on Ways and Means on September 16, 2003 (H.Rept. 108-270, Part I), and passed by the House on September 17, 2003.

**Making the ESA More User-Friendly.** Former Interior Secretary Babbitt initiated actions to decrease ESA conflicts in several ways. New FWS and NOAA Fisheries joint policies streamline permit procedures for small landowners, and other initiatives encourage landowners to increase protection for populations of listed species on their land. Under *safe harbor* agreements, landowners who increase suitable habitat can return to “baseline conditions” without penalty. *No surprises* agreements provide landowners with greater certainty regarding activities that might otherwise have triggered penalties, an incentive for landowners to develop Habitat Conservation Plans (HCPs), since a landowner properly implementing such an agreement is assured that there will be no further costs or restrictions on the use of the property to benefit the species covered by the HCP, except by mutual consent or in extraordinary circumstances in which changes may be implemented by the government without costs borne by the landowner. (See the final rule on Safe Harbor Agreements and Candidate Conservation Agreements (64 *Fed. Reg.* 32705, June 17, 1999). The rule modified the no surprises policy to require revocation of an incidental take permit if the permitted taking would be inconsistent with the survival and recovery of the relevant listed species, and the inconsistency is not remedied in a timely fashion. Federal managers also focused on listing species as threatened rather than endangered, to allow FWS to take advantage of the ESA’s more flexible provisions for protecting threatened species. While administrative changes have been made within the framework of existing law, there is great interest among some groups in codifying many of these changes in an amended ESA. Others are critical of the agreements as difficult to enforce and as locking in the government to inflexible long-term positions that sometimes are based on inadequate knowledge.

## **Additional Legislative Initiatives**

In the 108<sup>th</sup> Congress, a number of bills concerning ESA have been introduced besides those mentioned previously. Among those under active consideration is a bills concerned

primarily with national energy policy: S. 2095 (§347) would establish a pilot project in Wyoming, Montana, Colorado, Utah, and New Mexico designed to improve coordination of federal permits, including ESA §7 permits. In addition, S. 1210/H.R. 3378 would assist in the conservation of marine turtles and their nesting habitat in foreign countries. S. 1210 was reported on October 17, 2003, by the Senate Committee on Environment and Public Works (S.Rept. 108-167); and passed by the Senate on October 31, 2003.

On December 3, 2003, President Bush signed P.L. 108-148, which authorizes the Secretary of Agriculture (National Forest System lands) and the Secretary of the Interior (BLM lands) to conduct hazardous fuels reduction projects on lands that contain threatened and endangered species habitat (§102(a)(5)); directs the Secretary of Agriculture to establish the healthy forests reserve program by the Forest Service to protect, restore, and enhance degraded forest ecosystems on private lands to promote the recovery of threatened and endangered species (§§501-503); and directs the Secretary of the Interior to provide safe harbor and similar assurances under the ESA to landowners who enroll in the healthy forests reserve program when such enrollment will result in new conservation benefits for ESA-listed species (§506).

**Appropriations Issues.** Appropriations bills play an important role in the ESA debate. Appropriations provide funds for listing and recovery activities as well as finance FWS and NOAA Fisheries consultations necessary for permits, such as those with the Army Corps of Engineers on permits that are necessary for federal projects. See **Table 1** for recent ESA funding. P.L. 108-108 provides FWS appropriations for FY2004. P.L. 108-199 provided FY2004 funding for the coordination of international endangered species programs and for NOAA Fisheries.

For FY2005, the Administration requests \$289 million for FWS Endangered Species Act activities. This proposal includes an increase of \$5 million for species listing activities. Major decreases include recovery activities generally, pass-through grants for salmon (\$4 million), the California Natural Communities Conservation Plan HCP partners (\$2 million), wolf recovery (\$1.5 million), general recovery activities (\$1.4 million), Platte River recovery (\$1 million), sea otter and walrus research (\$0.9 million), and eider (a sea duck) recovery (\$0.9 million). NOAA Fisheries does not yet have figures available for endangered species programs for FY2004 or FY2005, since these funds are commingled with funds to protect marine mammals in its program for protected species.

**Table 1. Funding for Endangered Species Programs, FY2003-FY2005**  
(\$ in thousands)

	<b>FY2003 Approp.</b>	<b>FY2004 Approp.</b>	<b>FY2005 Request</b>
<b>Endangered Species Program</b>			
Candidate Conservation	9,867	9,808	8,610
Listing	9,018	12,135	17,226
Consultation	47,459	47,146	45,450
Recovery	65,412	67,907	58,154



	<b>FY2003 Approp.</b>	<b>FY2004 Approp.</b>	<b>FY2005 Request</b>
<b>Endangered Species Program</b>			
<i>Subtotal</i>	<i>131,756</i>	<i>136,996</i>	<i>129,440</i>
<b>Related Programs</b>			
Landowner Incentive Program <sup>a</sup>	-260	29,630	50,000
Stewardship Grants <sup>b</sup>	-65	7,408	10,000
Cooperative Endangered Species Conservation Fund <sup>c</sup>	80,473	81,596	90,000
Multinational Species Conservation Fund <sup>d</sup>	4,768	5,531	9,500
Neotropical Migratory Bird Fund <sup>d</sup>	2,981	3,951	—
<b>Total FWS</b>	<b>219,653</b>	<b>265,112</b>	<b>288,940</b>
<b>NOAA Fisheries</b>	<b>188,316</b>	<b>179,819</b>	<b>216,088</b>
<b>TOTAL</b>	<b>407,969</b>	<b>444,931</b>	<b>505,028</b>

**Sources:** Annual budget justifications, House and Senate committee and conference reports.

- a. \$40 million in FY2002 unobligated appropriations was rescinded, resulting in a net reduction for FY2003.  
b. \$10 million in FY2002 unobligated appropriations was rescinded, resulting in a net reduction for FY2003.  
c. In FY2004, \$50 million of this fund was derived from LWCF; the President's FY2005 budget request calls for entire amount to be derived from LWCF.  
d. From FY2002-FY2005, the President's budget has proposed subsuming the Neotropical Migratory Bird Fund withing the Multinational Species Conservation Fund, but to date Congress has rejected this proposal.

**ESA Listing Caps, New and Old.** Beginning in FY1998, Congress enacted annual limits (*caps*) on funding FWS for its ESA listing function. This language limits FWS discretion to transfer funds to finance additional listings, so that if courts mandate agency action on listing certain species, other listings may not be able to be funded. FWS supported these limits to assure that funding for other agency programs could not be diverted to finance additional ESA listing activities. However, courts have held that budget constraints do not excuse an agency from compliance, in some circumstances. These limits have been approved by Congress in succeeding fiscal year appropriations bills. The FY2005 request proposes limiting listing to \$17.2 million, of which no more than \$13.7 million would be used for most activities related to critical habitat designation.