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Endangered Species: Difficult Choices

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SUMMARY

The 107th Congress considered various measures proposing to amend the Endangered Species Act of 1973 (ESA). Major issues in recent years have focused on whether to incorporate further protection for property owners and reduce regulatory impacts, whether to increase the protection afforded listed species, or whether to clarify various aspects of the Act, such as the role of science in decision-making. The Clinton Administration made significant changes to ESA regulations, and many have advocated including these changes in the law itself.

The ESA has been one of the more contentious environmental laws. This may stem from the strict substantive provisions of this law, which can affect the use of both federal and non-federal 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 is administered by the Fish and Wildlife Service (FWS) for terrestrial and freshwater species and some marine mammals, and by the National Marine Fisheries Service (NMFS, now NOAA/Fisheries) for marine and anadromous species. The U.S. Geological Survey's Biological Resources Division conducts research on species for which the FWS has management authority.

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 were appropriated to implement the administrative provisions of the ESA in each subsequent fiscal year.

In the 107th Congress, the Senate Environment Subcommittee on Fisheries, Wildlife, and Water held an oversight hearing on the ESA listing and delisting process. The House Committee on Resources held several hearings on the role of science in ESA proceedings, and H.R. 4840 was reported (amended) on October 15, 2002. Other hearings were held by House and Senate committees on specific issues. In addition, a number of bills were introduced to address specific issues; two bills (S. 911 and H.R. 4579) were introduced to deal comprehensively with reauthorization and a host of ESA issues. On the international side, reauthorizations for the African Elephant Conservation Act (P.L. 107-111), the Rhinoceros and Tiger Conservation Act of 1994 (P.L. 107-112), and the Asian Elephant Conservation Act (P.L. 107-141) were enacted. Additional measures were introduced to increase protection for cranes (S. 2847) and marine turtles (S. 2897).

MOST RECENT DEVELOPMENTS

On December 2, 2002, President Bush signed H.R. 4546 into law as P.L. 107-314, without language limiting the designation of ESA critical habitat on Department of Defense lands. On November 25, 2002, President Bush signed H.R. 5005 into law as P.L. 107-296, wherein §421(b)(7) would transfer ESA §11 responsibilities (penalties and enforcement) to the new Department of Homeland Security. On November 15, 2002, the House passed S. 990 (amended), Title I of which would create a new ESA §13 program to provide dedicated funding so as to promote the recovery of ESA-listed species by property owners; Title XII of S. 990 as passed by the House incorporates the language of S. 2897 to authorize assistance and create a multinational conservation fund for marine turtles (the Senate did not act on the amended House version).

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 all species 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 a species listed as threatened. Distinct population segments of vertebrate species may also be listed as threatened or endangered, and some populations of chinook, coho, chum, and sockeye salmon in Washington, Oregon, Idaho, and California are protected under the ESA while 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 (16 U.S.C. 1532). 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 detailed background information on the ESA, see CRS Report RL31654, *The Endangered Species Act: A Primer*.

As of August 31, 2002, a total of 1,072 species of animals and 746 species of plants had been listed as either endangered or threatened, of which the majority (517 species of animals and 743 species of plants) occur in the United States and its territories and the remainder only in other countries. Of the 1,260 U.S. species, 976 are covered in recovery plans. (See the U.S. Fish and Wildlife Service (FWS) at [http://endangered.fws.gov/] and the National Marine Fisheries Service (NMFS, which recently changed its name to NOAA Fisheries) at [http://www.nmfs.noaa.gov/endangered.htm].)

At times, efforts to protect and recover listed species can be controversial; declining species can function like the proverbial canary in the coal mine, since declining species often 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 the snail darter); 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). Some current issues are discussed below.

Prohibitions and Penalties. The Act contains civil and criminal penalties for "take" of endangered species, which 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 C.F.R. 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*.)

Listing. Species may be listed on the initiative of the appropriate Secretary or by petition from a state or federal agency — including FWS or NMFS/NOAA Fisheries, another entity or an individual. 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 making the decision as to whether a species needs the protections of the Act, 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. (See CRS Report RL30792, *The Endangered Species Act: Consideration of Economic Factors*, for an analysis of when and where the ESA does allow 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. The appropriate Secretary may also 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 of a FWS regulation a court has found to be an unlawful interpretation of the Act in that it does not take into account the recovery of listed species. While any area, whether or not federally owned, may be designated as CH, private land is affected by designation primarily if some federal action (e.g., license, loan, permit, etc.) is also involved, such that "consultation" is necessary. Federal agencies must avoid "adverse modification" of CH, either through their own actions or activities that are federally approved or funded.

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

Land Acquisition and Cooperation. The federal government may acquire land to conserve (recover) endangered and threatened 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% matching amount. Under the 1988 amendments, a fund was created to provide for the state grants. While the authorized size of the fund is determined according to a formula, money from the fund still requires annual appropriation (16 U.S.C. 1535).

Permits. There are two ways in which proposed actions can be evaluated for possible adverse impacts on listed species and permits issued. First, if federal agency actions or actions of a non-federal 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 harm to the species. 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 that allows incidental taking of a species, 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 to allow the "incidental take" of species during otherwise lawful actions. An applicant for a permit must submit a conservation plan that shows the likely impact of the planned action, steps to be taken to minimize and mitigate the impact, and funding for the mitigation; alternatives that were considered and rejected; and any other measures that the Secretary may require. The FWS and NMFS/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 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) fully granted. The President may grant exemptions for actions in declared disaster areas, but the ESA does not address emergency actions or situations. The Committee must 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. (For further discussion, see CRS Report 90-242 ENR, *Endangered Species Act: The Listing and Exemption Processes*.)

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; see CRS Report 94-675 ENR, *Convention on International Trade in Endangered Species: Its Past and Future*), 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, rather than two. In contrast to the ESA, CITES focuses exclusively on trade and does not consider or attempt to address habitat loss. 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.

Issues in the 107th Congress

ESA reauthorization has been on the legislative agenda since authorization expired in 1992, and bills have been introduced in each Congress to address various aspects of endangered species protection.

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 our nation runs out of open space and our population puts increasing 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. Some of these situations have been the subject of Congressional oversight and legislative interest.

Klamath River Basin. For example, in the Klamath River Basin, which straddles the Oregon/California border, the Bureau of Reclamation consulted with the FWS and NMFS/NOAA Fisheries on operating the Klamath Project in 2001, an acute drought year. As a result of those consultations, the Bureau decided to allocate nearly all the water to the protection of two species of endangered suckers in Upper Klamath Lake, the project's primary reservoir, and threatened coho salmon in the Klamath River, which drains the Basin. (Whether there is enough water to meet both needs may present another difficulty.) This action was taken to avoid jeopardizing these species and to meet obligations to the Klamath and Yurok tribes. The authority and duty of the Bureau to use irrigation water to preserve species was upheld in Klamath Water Users Protective Association v. Patterson, 204 F.3d 1206 (9th Cir, 1999). Because of the drought conditions, implementation of this operating plan meant that water could not be delivered to many irrigation-dependent Oregon farmers. In addition, the lack of downstream flows had adverse impacts on salmon fisheries and on federal wildlife refuges that are home to many migratory birds and ESA-listed bald eagles. Therefore, upstream farmers were pitted against salmon fishing, Native American interests, and other downstream users; all sides have policy concerns that can be asserted and involve valuable sectors of the local economy. Farmers point to their contractual rights and the hardships for their families; others note that the salmon industry may be 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 agencies' determinations is simply wrong. A federal district court

denied a plea for release of water to the farmers (Kandra v. United States, 145 F. Supp. 1192 (D. Or. 2001)).

On March 13, 2002, the House Resources Committee held an oversight hearing on a National Research Council's (NRC) Interim Report evaluating two federal biological opinions on endangered and threatened fishes in the Klamath River Basin that had prevented the Bureau from delivering water to many farmers in the Klamath Basin. The NRC released its report in February 2002 and concluded there was no sound scientific basis for maintaining Upper Klamath Lake levels and increased river flows as recommended in those biological opinions, nor sufficient basis for supporting the contrary assertions. On February 27, 2002, the Bureau released its 10-year biological assessment for its 10-year Klamath Project operation plan, in which it anticipated regular water deliveries to farmers for the 2002 growing season. Operating under a letter of permission from the FWS, the Bureau released only very low flows downstream in April and May 2002 and instead delivered water to the Upper Basin farmers. The Bureau also rejected the FWS and NMFS/NOAA Fisheries biological opinions on its 10-year operating plan and stated that it would comply for the immediate future but also request new consultation. For additional information, see CRS Report RL31098, *Klamath River Basin Issues: An Overview of Water Use Conflicts* and CRS Issue Brief IB10019, *Western Water Resource Issues*. Therefore, despite increased rains and water availability, the same set of issues and interests continue to be present. Section 5 of H.R. 5698 would have required the Secretary of the Interior to modify the Klamath Project to ensure that Klamath River flows exceed certain minimum levels; no action was taken on this measure. H.R. 2827 would have provided disaster relief to Klamath Basin residents who were economically harmed by ESA-related actions. H.R. 2828, the Klamath Basin Emergency Operation and Maintenance Refund Act, passed both the House and Senate and authorizes the Secretary of the Interior to reimburse project operation and maintenance expenses for 2001.

Salmon Restoration. Similarly, salmon protection in the Pacific Northwest presents many difficult choices, especially now that regional hydropower facilities are playing an increasingly important role and drought conditions have become more severe. ESA listings by NMFS/NOAA Fisheries officials in 1999 and 2000 completed most of the pending decisions on Pacific salmon and steelhead trout, with a total of 26 distinct groups (i.e., evolutionarily significant units) now listed as either threatened or endangered. NMFS/NOAA Fisheries officials are working closely with state, local, and tribal officials, as well as the public, to develop a variety of recovery measures that address habitat restoration and other concerns. In late July 2000, NMFS/NOAA Fisheries decided, in response to an Army Corps of Engineers review, to delay any recommendation to Congress concerning whether or not to breach the four Lower Snake River hydroelectric dams to benefit salmon recovery. NMFS/NOAA Fisheries concluded, in a draft Biological Opinion and a Basin-Wide Recovery Strategy, that the four Lower Snake River dams should remain in place for at least 8 more years, to allow for a more complete assessment of progress toward recovering endangered salmon. The final Federal Columbia River Power System biological opinion, reflecting this policy, was released on December 21, 2000 (this opinion is available at [http://www.nwr.noaa.gov/1hydrop/hydroweb/docs/Final/2000Biop.html]).

In *Alsea Valley Alliance v. Evans* (161 F. Supp 2d 1154 (D.C. Or. 2001), Judge Hogan remanded the listing of the Oregon Coast Evolutionary Significant Unit of coho salmon as a threatened species, finding that 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 bald eagle to be listed in an area (the lower 48 states) even if a viable population exists elsewhere (Alaska). NMFS/NOAA Fisheries had clarified in a policy statement what was meant by distinct population segment in the context of certain fish. NMFS/NOAA Fisheries equated "distinct population segment" with being an "evolutionary significant unit (ESU)" (56 Fed. Reg. 58,612 (November 20, 1991)). An ESU is a population that is "substantially reproductively isolated from other conspecific population units" and "represent[s] an important component in the evolutionary legacy of the species" (56 Fed. Reg. 58,618). However, the NMFS/NOAA Fisheries policy on hatchery fish (58 Fed. Reg. 17,573 (April 5, 1993)) states that a hatchery population will not be considered part of an ESU if the hatchery population is of a different genetic lineage than natural populations; artificial propagation has produced appreciable changes in the hatchery population in characteristics that are believed to have a genetic basis; or there is substantial uncertainty about the relationship between existing hatchery fish and the natural population (58 Fed. Reg. 17,575).

The mistake the Judge felt NMFS/NOAA Fisheries made with respect to coho salmon was to include in the coho ESU hatchery fish that in this instance were genetically identical to naturally hatched fish in the same water source, but *not* to count the same fish when deciding whether to list the coho or not. The court concluded that, in this instance, not considering the numbers of 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.

Although the United States did not appeal this decision, intervening parties have appealed, and the 9th Circuit blocked implementation of the lower court decision until the appellate case is heard. It is not clear how this case might affect other listings, since subsequent decisions could strike down other listings where genetically similar hatchery fish were included in ESUs but not counted in making the listing decisions. In addition, it is not clear whether courts will approve the NMFS/NOAA Fisheries hatchery policy that permits excluding from a population segment fish from a dissimilar genetic lineage, even if they otherwise meet the definition of the ESU. The decision could have implications for salmon listings in general.

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 Act – and one of its purposes is to protect the ecosystems of which species listed as endangered are a part. The Act 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 this phrase in the law itself or in FWS regulations.

In many instances, there may be little information on many species facing extinction and few personnel and limited funds available to conduct studies on many of the less charismatic species, or those of little known economic value. What should be done in such instances? The Act does not expressly address this question, but it could be argued that, combining the protective purpose of the Act – 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 p. 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 HR. Conf. Rep. No 697, 96th Cong., 2d Sess. 12 (1979), which stated the "best information available" language was intended to allow the FWS to issue biological opinions even when inadequate information was available, 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."

The FWS and NMFS/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 NMFS/NOAA Fisheries will receive and use information from a wide variety of sources, including from individuals. Information may range from the informal – oral or anecdotal – to peer reviewed scientific studies, and hence the reliability of the information can also be variable. Service biologists are to impartially review and evaluate all information for purposes of listing, consultation, recovery, and permitting actions, and to ensure that any information used by the Services to implement the Act is "reliable, credible, and represents the best scientific and commercial data available." Service 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 Service 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 will also formally solicit expert opinions and peer review to ensure the best biological and commercial information. With respect to listing decisions, the agencies will 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 (9th 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 treat one species differently from the way other similarly-situated species are treated (*Ibid.*), and may not 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, and a fact that reflects Congress' intent that the FWS take conservation measures before a species is 'conclusively' headed for extinction" (Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 680 (D. D.C. 1997)). If the FWS does not base its listings on speculation or surmise or disregard superior data, the fact that the studies it does rely on are imperfect

does not undermine those authorities 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 species of duck). Another court stated that the bar the FWS has to clear in terms of evidence is very low, but it must at least clear it and, in the context of issuance of Incidental Take Permits, 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 (9th Cir. 2001)).

Several bills were introduced in the 107th Congress seeking to clarify the role of science in ESA decisions. H.R. 2829/S. 1912 would have required greater weight be given to scientific or commercial data that were empirical or had been field-tested or peer-reviewed, while H.R. 3705/H.R. 4840 would have modified the listing petition process and established independent review boards. H.R. 4840 would also have required field data collection before listing could occur. The House Committee on Resources held a hearing on H.R. 2829 and H.R. 3705 on March 20, 2002, and on H.R. 4840 on June 18 and 19, 2002. On October 15, 2002, H.R. 4840 was reported, amended (H.Rept. 107-751). For more information on this issue, see CRS Report RS21264, *The Endangered Species Act and "Sound Science*" and CRS Report RL31546, *The Endangered Species Act and Science: The Case of Pacific Salmon*.

DOD Activities. The events of September 11, 2001, have focused attention on all statutes that might impinge on military training activities. The ESA allows for an 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 is worded as an exemption that must be granted by the high-level committee assembled to consider exemptions.

On April 23, 2002, H.R. 4546 was reported (H.Rept. 107-436), with §312 proposing to limit the designation of CH on Department of Defense (DOD) lands. This measure was passed by the House on May 10, 2002. Section 312 of H.R. 4546 as passed by the House would have amended the ESA in several respects. It would have inserted "or national security" into the CH evaluation process, thereby making consideration of that factor an express requirement. It also would have prohibited designation of CH on DOD lands "subject to" the Sikes Act, another statute that provides for a land management process on such lands, if a plan "addresses" special management and protection of the lands. Because completion of a plan is not expressly required, but is implied by the fact that the Secretary must find that a plan "addresses" certain things, and the meaning of "addresses" is unclear, arguably this process would not be equivalent to designation of CH. The section would have

expressly retained the ESA duties to consult on agency activities and the prohibitions of the ESA would have continued to apply. Section 1201(a) of S. 2225 also would have eliminated designation of CH on DOD lands if a Sikes Act plan was completed that "addresses" endangered and threatened species and their habitat. On June 27, 2002, the Senate amended H.R. 4546 to substitute the language of S. 2514 (which did not contain language limiting the designation of CH on Department of Defense lands) and passed H.R. 4546, as amended. On November 12, 2002, the conference committee report on H.R. 4546 was filed (H.Rept. 107-772) deleting the ESA provisions in §312 of the House version, and subsequently the amended H.R. 4546 (without the ESA provisions) was signed into law as P.L. 107-314. See CRS Report RL31415, *The Endangered Species Act, Migratory Bird Treaty Act, and Department of Defense Readiness Activities: Current Law and Legislative Proposals*.

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 C.F.R. §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 the FWS allegedly required the Army to take actions 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 may actually be required is not yet known. Although the import of the wording was not clear, §705 of H.R. 4775 as passed by the House on May 24, 2002, addressed how water consumption at military installations was to be considered under the ESA, but similar provisions were not in the measure passed by the Senate on June 7, 2002, after the Senate substituted the language of S. 2551 as an amendment to H.R. 4775. A conference report was filed for H.R. 4775 on July 19, 2002 (H.Rept. 107-593); the House (July 23) and Senate (July 24) agreed to the conference report, excluding the House provision for water consumption at military installations in relation to the ESA; this measure was signed into law as P.L. 107-206, without the ESA provision.

Private Property and Takings. Some landowners fear that the presence of an ESA-listed species or the designation of their land as CH for a listed species will result in restrictions of 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 does not include 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. US, 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, so the value of the case as precedent is not yet clear.

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 any loss of 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. In the 107th Congress, H.R. 2389 and H.R. 2827 proposed to compensate persons of the Klamath River Basin who were economically harmed as a result of ESA implementation, while S. 2604 would have required the federal government to assume all costs relating to implementation of and compliance with the ESA.

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 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 93-346 A, *Endangered Species Act and Private Property Rights: A Legal Primer*.) However, both proponents and opponents of the ESA favor enacting incentives (primarily tax benefits) to encourage landowner cooperation.

Funding for Land Conservation. In the 106th Congress, several bills would have appropriated funds for acquiring lands to conserve listed species. These bills ultimately died, but additional funding for some of these programs was included in annual appropriations for FY2001 (Title VIII of P.L. 106-291), including the Cooperative Endangered Species Conservation Program, which provides grants to states, including support for state land acquisition. Other federal land acquisition funds contained in Title VIII of P.L. 106-291 may benefit endangered species by protecting habitat, and this approach re-surfaced in the 107th Congress (Title VII of H.R. 701/S. 1328 and Title II of S. 990). Title VII of H.R. 701/S. 1328 and Title II of S. 990 would have added a new §13 to the ESA to provide dedicated funding to promote the recovery of ESA-listed species by property owners; H.R. 701 was reported (amended) by the House Committee on Resources on October16, 2002 (H.Rept. 107-758, Part I), while S. 990 was reported (amended) by the Senate Committee on Environment and Public Works on December 13, 2001 (S.Rept. 107-123). The Senate passed S. 990 (amended) on December 20, 2001, and the House passed S. 990 (amended) on November 15, 2002, with the ESA program as Title I. This measure died when the Senate did not act on the amended House version. (For more information, see CRS Report RL30444, *Conservation and Reinvestment Act (CARA): A Comparison of Current Versions of H.R. 701 with Current Law*.)

Making the ESA More User-Friendly. Former Interior Secretary Babbitt initiated actions to decrease ESA conflicts in several ways. New FWS/NMFS/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 reach conservation agreements (i.e., habitat conservation plans or 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 *FR* 32705; June 17, 1999 that modified the "no surprises" policy to require that a condition of a §10 incidental take permit be that 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, the incidental take permit may be revoked.) Federal managers 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 long-term positions that sometimes are based on inadequate knowledge.

Critical Habitat Designation. Under current law, FWS or NMFS/NOAA Fisheries must designate CH at the time a species is listed. Two exceptions are provided: if designation is not "prudent" (e.g., due to the threat of illegal collecting or killing), or if CH is not "determinable" due to insufficient data, in which case designation may be postponed as long as one year after species listing. The Clinton Administration supported restrictions on its own ability to designate CH under the ESA, as did the George W. Bush Administration. (See *ESA Listing Caps, New and Old*, below.)

FWS, based on its interpretation of a regulation that takes away the value of designating habitat to the recovery of a listed species, asserts that CH offers little protection for a species beyond that already available under the listing process and is a poor use of scarce budgetary resources. 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. FWS designates CH for only about 10% of listed domestic species; yet in every case brought against FWS for failure to designate CH, the agency has lost, and, in a case involving FWS's and NMFS's/NOAA Fisheries' failure to designate CH for threatened Gulf sturgeon, the Fifth Circuit found agency interpretation to be erroneous (Sierra Club v. U.S. Fish and Wildlife Service, 245 F. 3d 434 (5th Cir. 2001), and a settlement agreement resulted in a CH proposal. FWS had solicited comments on its proposal to "develop policy or guidance and/or revise regulations, if necessary, to clarify the role of habitat in endangered species conservation" (64 *FR* 31871-31874; June 14, 1999), but no proposal has been issued. See CRS Report RS20263, *The Role of Designation of Critical Habitat under the Endangered Species Act.*

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 and the presence of CH may shed light on whether "harm" has occurred, the express duty to avoid adverse modification of CH is an express obligation only for federal agencies and actions.

Additional Legislative Initiatives

On March 15, 2001, the House Resources Subcommittee on Fisheries Conservation, Wildlife, and Oceans held a hearing on reauthorizations for the African Elephant Conservation Act (H.R. 643), the Rhinoceros and Tiger Conservation Act of 1994 (H.R. 645), and the Asian Elephant Conservation Act of 1997 (H.R. 700). On January 8, 2002, the President signed both H.R. 643 as P.L. 107-111 and H.R. 645 as P.L. 107-112. On February 12, 2002, the President signed H.R. 700, Asian Elephant Conservation Reauthorization Act of 2001 as P.L. 107-141. S. 2847 would have authorized activities to assist the international conservation of cranes; this measure was reported (amended) by the Senate Committee on Environment and Public Works on October 8, 2002 (S.Rept. 107-302). S. 2897 would have authorized assistance and created a multinational conservation fund for marine turtles; this measure was reported (amended) by the Senate Committee on Environment and Public Works on October 8, 2002 (S.Rept. 107-303). In addition, the provisions of S. 2897 were added as Title XII of S. 990, which the House passed on November 15, 2002. This measure died when the Senate did not act on the amended House version.

Section 421(b)(7) of P.L. 107-296 transferred ESA §11 responsibilities (penalties and enforcement) to the new Department of Homeland Security. P.L. 107-171 included authorization of a wildlife habitat incentive program to preserve CH and avoid ESA listings (§2502) and an ESA amendment on animal quarantine laws (§10418(b)(3)). Attempts to increase protection for bears by including the Bear Protection Act of 2002 (H.R. 397/S. 1125) in this measure were stricken in conference.

Other measures not acted upon proposed to exempt federal agencies from ESA consultation for certain activities (H.R. 472); modify the ESA regulatory process (H.R. 1402); modify federal land management activities under ESA (H.R. 1403); modify ESA provisions relating to liability for civil and criminal penalties (H.R. 1404); require the Department of Defense to fully comply with the ESA (§3(a) of H.R. 2154); transfer ESA authority for anadromous fish from NMFS/NOAA Fisheries to FWS (H.R. 2409); direct the Secretary of the Interior to approve the HCP developed by the Imperial Irrigation District for the Salton Sea and provide for construction of habitat enhancement projects (H.R. 2764/H.R. 5123); expand protective measures for North Atlantic right whales (H.R. 3095/S. 1380); amend the ESA to authorize federal agencies to promptly respond to emergencies involving human health and safety (H.R. 3259); authorize funding for pallid sturgeon investigations in the Missouri River (§2(h)(3) of H.R. 3570); modify the communication and public hearing process related to ESA listing decisions involving the Administrative Procedures Act (H.R. 3706); authorize designation of survival habitat for listed species and specify its relation to critical habitat (H.R. 3707); modify requirements for scientific data in designating critical habitat (H.R. 3798); specify requirements for listing the black-tailed prairie dog under the ESA (H.R. 3920); establish criteria for designating CH in Hawaii (H.R. 4656); limit ESA applicability for actions on military and private land and with respect to plants (H.R. 5709); oppose efforts to downlist whale species listed under the CITES (S.Res. 311); modify the ESA listing, recovery planning, and delisting processes (S. 347); amend the Robert T. Stafford Disaster Relief and Emergency Assistance Act to expand the definition of "major disaster" to include an application of the ESA that causes severe economic hardship (S. 1384); amend the list of animal quarantine laws in §11(h) of the ESA (§18(b)(3) of S. 1482); amend the Federal Agriculture Improvement and Reform Act of 1996 to establish a pilot program to avoid the listing of endangered species and preserve critical habitat (§801 of S.

1267); authorize a water conservation program for agricultural lands in the Klamath, the Truckee-Carson, and Walker River Basins to benefit ESA-listed species (§226 of S. 1727); authorize funding for Pacific salmon restoration (S. 1825);and modify federal land management practices to better coordinate ESA concerns (§202 of S. 2474).

H.R. 3558 would have authorized grants to states and local governments to combat invasive species; this measure was reported (amended) by the House Committee on Resources on June 18, 2002 (H.Rept. 107-512). H.R. 5395 would have established a marine and fresh-water research program to assess rates and patterns of introductions of nonnative aquatic species in aquatic ecosystems, while H.R. 5396 and S. 2964 would have reauthorized and amended the Nonindigenous Aquatic Nuisance Prevention and Control Act to modify federal response to invasive species; no action was taken on any of these measures.

H.R. 1985, H.R. 3208, and S. 976 included language that would have authorized creation of an "environmental water account" within the CALFED process to provide water for ESA-listed fish; H.R. 3208 was reported (amended) by the House Committee on Resources on February 14, 2002 (H.Rept. 107-360, Part I). No action was taken on the other measures.

On May 9, 2001, the Senate Environment Subcommittee on Fisheries, Wildlife, and Water held an oversight hearing on the ESA listing and delisting process. On February 16, 2002, the House Committee on Resources held an oversight field hearing at Grand Island, Nebraska, on the Platte River Cooperative Agreement and critical habitats. On March 6, 2002, the House Committee on Resources held an oversight hearing on the Canada Lynx Interagency National Survey and endangered species data collection. Two comprehensive bills, S. 911 and H.R. 4579, proposed to reauthorize the ESA. No hearings were held on either bill, and no action was taken.

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/NMFS/NOAA Fisheries consultation necessary for permits, such as Army Corps of Engineers permits, that are necessary for federal projects. See the table below for recent ESA funding. FY2002 Department of the Interior appropriations (FWS) were substantially increased in P.L. 107-63 (H.R. 2217), signed by President Bush on November 5, 2001. FY2002 Department of Commerce appropriations (NMFS/NOAA Fisheries) were signed by President Bush on November 28, 2001, as P.L. 107-77 (H.R. 2500); FY2003 NMFS/NOAA Fisheries appropriations were considered in S. 2778, which was reported (amended) by the Senate Committee on Appropriations on July 24, 2002 (S.Rept. 107-218). FY 2002 funding for international endangered species programs were considered in the foreign operations bill (H.R. 2506), which was signed into law by the President as P.L. 107-115 on January 10, 2002. FY2003 funding for these international programs was considered in S. 2779, which was reported by the Senate Committee on Appropriations on July 24, 2002 (S.Rept. 107-219), and in H.R. 5410, which was reported by the House Committee on Appropriations on September 19, 2002 (H.Rept. 107-663). The 107th Congress did not complete work on the FY2003 appropriations measures.

On June 28, 2002, the Senate Committee on Appropriations reported S. 2708 (S.Rept. 107-201), providing FY2003 Department of the Interior appropriations. The House Committee on Appropriations reported H.R. 5093 on July 11, 2002 (H.Rept. 107-564), and

the House passed this measure (amended) on July 17, 2002. Senate floor debate on H.R. 5093 began on September 5, 2002, but the 107th Congress did not complete action on this appropriations measure.

On March 15, 2002, the House Committee on The Budget reported H.Con.Res. 353, wherein §406(b) expresses the sense of Congress that Pacific Northwest salmon recovery was a high-priority item for funding in the FY2003 federal budget (H.Rept. 107-376); this measure was passed by the House on March 20, 2002.

Endangered Species Program Appropriations

(x $1000)

	FY2001 Enacted	FY2002 Request	FY2002 Enacted	FY2003 Request	FY2003 S.Rept.	FY2003 H.Rept.
Candidate Conservation	7,052	7,220	7,620	8,682	9,982	8,682
Listing	6,341	8,476	9,000	9,077	10,000	9,077
Consultation	42,750	41,901	45,501	47,770	47,970	47,770
Recovery	59,835	54,217	63,617	60,215	64,427	64,715
Subtotal	115,978	111,814	125,738	125,744	132,379	130,244
Landowner Incentive	4,969	0	40,000	50,000	600	40,000
Stewardship Grants	0	0	10,000	10,000	200	10,000
Coop. End. Species Conservation Fund (CESCF)	104,694*	54,694	96,235	91,000	99,400	121,400
Total FWS	**225,641**	**166,508**	**271,973**	**276,744**	**232,579**	**301,644**
Total NMFS	**102,476**	**108,314**	**101,483**	**110,845**	not reported	not available

Sources: Annual budget justifications, House and Senate committee reports, and floor debates.
* Of the FY2001 CESCF funds, $77.829 million was provided in Title VIII of P.L. 106-291.

ESA Listing Caps, New and Old. Beginning in FY1998, Congress enacted annual limits (i.e., "caps") on funding FWS for its ESA listing function. This language limits FWS discretion to transfer funds to finance additional listings: 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.

The George W. Bush Administration's FY2002 budget proposed a new version of this cap by requesting authority to prioritize listings within the cap, regardless of judicial orders. The Administration stressed that (a) current court orders alone meant that FWS's ESA listing

function was likely to run out of funds before the end of the fiscal year, and (b) if FWS were to make listing determinations on merely its own estimated backlog, the cost would be roughly $120 million. The agency's critics (calling the language an "extinction rider") responded that (1) few listings would have taken place in the last several years without the lawsuits; (2) the FWS's claims of conscientious attention to the ESA are contradicted by FWS's failure to seek adequate funding to address the backlog of ESA listings in light of its assertion of a $120 million need; (3) the restriction is one-sided since de-listings and down-listings would have no such cap; and (4) the new authority would be a fundamental change in the ESA, since FWS could choose which species to protect, rather than protecting all species meeting the criteria specified under §4(b) of the ESA.

Acting on H.R. 2217 (FY2002 Department of the Interior appropriations), the House Appropriations Committee rejected the Administration's proposed language change, retained the current $8.48 million cap on spending for listing activities, and accepted a "subcap" of $6 million on the designation of new CH. Therefore, if FWS were ordered to designate even a few areas of CH, funding for new ESA species listings could be restricted to no more than $2.48 million. The Senate passed a $9 million cap on listing, but did not include a "subcap" on CH, nor did it accept the Administration's proposed change. The conference agreement (H.Rept. 107-234, October 11, 2001) adopted the $9 million funding level for the listing program and specified that the $6 million CH designation limitation is exclusive of funds needed for litigation support. This measure was signed as P.L. 107-63 on November 5, 2001. The Bush Administration's FY2003 budget proposed $9.077 million for listing, with a subcap of $5 million for CH; action on FY2003 appropriations was not completed by the 107th Congress.

LEGISLATION

Related public laws and bills are discussed in the text of this document under "Background and Analysis."

P.L. 107-63 (H.R. 2217); P.L. 107-77 (H.R. 2500); P.L. 107-111 (H.R. 643); P.L. 107-112 (H.R. 645); P.L. 107-115 (H.R. 2506); P.L. 107-141 (H.R. 700); P.L. 107-171 (H.R. 2646); P.L. 107-206 (H.R. 4775); P.L. 107-296 (H.R. 5005); and P.L. 107-314 (H.R. 4546).

H.Con.Res. 353 (Nussle); H.R. 397 (Gallegly); H.R. 472 (Radanovich); H.R. 701 (Young of Alaska); H.R. 1402 (Thomas); H.R. 1403 (Thomas); H.R. 1404 (Thomas); H.R. 1985 (Calvert); H.R. 2154 (Filner); H.R. 2389 (Herger); H.R. 2409 (Otter); H.R. 2764 (Hunter); H.R. 2827 (Walden); H.R. 2828 (Walden); H.R. 2829 (Walden); H.R. 3095 (Delahunt); H.R. 3208 (Calvert); H.R. 3259 (McInnis); H.R. 3558 (Rahall); H.R. 3570 (Bereuter); H.R. 3705 (Pombo); H.R. 3706 (Pombo); H.R. 3707 (Pombo); H.R. 3798 (Tancredo); H.R. 3920 (Thune); H.R. 4579 (George Miller); H.R. 4656 (Mink); H.R. 4840 (Hansen); H.R. 5093 (Skeen); H.R. 5123 (Hunter); H.R. 5395 (Ehlers); H.R. 5396 (Gilchrest); H.R. 5410 (Kolbe); H.R. 5698 (Thompson of California); H.R. 5709 (Hansen); S.Res. 311 (Kerry); S. 347 (Thomas); S. 911 (Smith of Oregon); S. 976 (Feinstein); S. 990 (Smith of New Hampshire); S. 1125 (McConnell); S. 1267 (Crapo); S. 1328 (Landrieu); S. 1380 (Kerry); S. 1384 (Smith of Oregon); S. 1727 (Reid); S. 1825 (Boxer); S. 1912 (Smith

of Oregon); S. 2225 (Levin); S. 2474 (Craig); S. 2604 (Enzi); S. 2708 (Byrd); S. 2774 (Roberts); S. 2778 (Hollings); S. 2779 (Leahy); S. 2847 (Feingold); S. 2897 (Jeffords); and S. 2964 (Levin).