



NEWS

U.S. DEPARTMENT OF THE INTERIOR

FOR IMMEDIATE RELEASE
May 28, 2003

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ENDANGERED SPECIES ACT "BROKEN" -- FLOOD OF LITIGATION OVER CRITICAL HABITAT HINDERS SPECIES CONSERVATION

Faced with mounting numbers of court orders from six years of litigation, the Interior Department's U.S. Fish and Wildlife Service will soon run out of funds to designate critical habitat for threatened and endangered species, Assistant Secretary of the Interior for Fish and Wildlife and Parks Craig Manson said today.

More important, the flood of court orders requiring critical habitat designations is undermining endangered species conservation by compromising the Service's ability to protect new species and to work with states, tribes, landowners and others to recover those already listed under the Act, Manson said.

In July, the U.S. Fish and Wildlife Service will exhaust the funds required to meet its obligations to designate critical habitat under court orders and settlements for FY 2003. The administration has requested authority from Congress to shift money from other endangered species programs to cover the shortfall. These include programs to work with landowners on conservation projects to keep imperiled species from needing listing under the Act, consultation with other federal agencies to protect species, and recovery work for species already threatened or endangered.

The Service will also approach plaintiffs and courts to seek extensions to deadlines in affecting 32 species. These extensions will be sought solely in order of the due dates of the court orders.

"The Endangered Species Act is broken. This flood of litigation over critical habitat designation is preventing the Fish and Wildlife Service from protecting new species and reducing its ability to recover plants and animals already listed as threatened or endangered," Manson said. "Imagine an emergency room where lawsuits force the doctors to treat sprained ankles while patients with heart attacks expire in the waiting room and you've got a good picture of our endangered species program right now."

The President's FY 2004 budget request for listing totals nearly \$12.3 million, an amount that, if approved by Congress, is almost double the \$6.2 million appropriated in FY 2000 and a 35 percent increase over FY 2003.

But Manson emphasized that additional funding alone will not solve the longterm problem.

"Conserving habitat is essential for endangered species, but critical habitat as mandated by the ESA frustrates that goal," he said. "This is a classic example of good intentions failing the test of reality."

Manson noted that two-thirds of the endangered species listing budget is being consumed by court orders and settlement agreements requiring designation of critical

habitat for species already on the endangered species list. In most instances, designation of critical habitat provides little additional protection for endangered species.

"This is not a new problem," he said. "The previous administration also testified before Congress that this situation is detrimental to species conservation and needs to be resolved. The ever-increasing number of lawsuits has now brought this problem to a crisis where we are simply out of funds for this year."

Designating an area as critical habitat means that federal agencies are required to consult with the Fish and Wildlife Service on the impacts of actions they authorize, fund, or carry out, on designated critical habitat.

However, these requirements provide little additional protection for most species. This is because, as soon as a species is listed, federal agencies are already required to consult on the impacts of their activities on the species, whether or not critical habitat is officially designated.

In almost all cases, recovery of listed species will come through voluntary cooperative partnerships, not regulatory measures such as critical habitat. Habitat is also protected through cooperative measures under the ESA including Habitat Conservation Plans, Safe Harbor Agreements, Candidate Conservation Agreements, and state grant programs. In addition, voluntary partnership programs such as the Service's Private Stewardship Grants and Partners for Fish and Wildlife program also restore habitat. Many national wildlife refuges, managed by the Fish and Wildlife Service, provide habitat for endangered species, and states also provide for endangered species on their wildlife management areas.

The ESA requires that critical habitat be designated at the time of listing to the maximum extent prudent and determinable. Facing many species in need of protection, a limited budget, and incomplete knowledge about the distribution and needs of species, the previous administration made designation of critical habitat a lower priority than other listing actions. Moreover, that administration found that designation was "not prudent" for the vast majority of species as critical habitat would not provide a benefit to the species.

Lawsuits have greatly increased since 1997, when an appeals court ruled that this "not prudent" standard did not comply with the ESA. Another appeals court shortly thereafter held that courts must order the Service to designate critical habitat, even if it is lower in priority than other actions required by the ESA. Since that time, the Service has been sued over failure to designate critical habitat for species at the time they were listed, and when resources were diverted to address that issue, for missing other statutory deadlines. In addition, there have been challenges to the merits of the critical habitat designations made pursuant to these court orders.

Critical habitat designations impact species listings because both activities are funded from the same part of the Fish and Wildlife Service's budget. Critical habitat designations are far more time consuming and costly than listings.

Congress provided a total of \$6 million in the FY 2003 to designate critical habitat for already listed species, nearly two-thirds of the \$9.077 million budget for the Service's endangered species listing program. The Service estimates the total cost of complying with all court orders and court-approved settlement agreements requiring the Service to work on critical habitat for already listed species in FY 2003 to be approximately \$8 million, leaving a shortfall of \$2 million.

"Spending more than two-thirds of our listing budget on critical habitat for already listed species flies in the face of logic and the intent of the Endangered Species Act. We need to make decisions about how to use our limited resources based on the most urgent needs of species, not on who can get into a courtroom first," Manson said.