

U.S. Fish and Wildlife Service Listing Program Work Plan Questions and Answers

What action is the U.S. Fish and Wildlife Service taking today?

The U.S. Fish and Wildlife Service (Service) has unveiled a work plan that will allow the agency to focus its resources on the species most in need of protection under the Endangered Species Act (ESA).

The Service is filing the work plan today in a consolidated case in the U.S. District Court for the District of Columbia as part of a proposed agreement with one of the most frequent plaintiffs. The work plan, if approved by the Court, will enable the agency to systematically, over a period of six years, review and address the needs of more than 250 species now on the list of candidates for protection under the ESA, to determine if they should be added to the Federal Lists of Endangered and Threatened Wildlife and Plants. All 251 of these species were previously determined by the Service to warrant protection, but action was deferred because of higher listing priorities and the need to allocate resources for other work.

Who administers the Endangered Species Act (ESA)?

Over the past 35 years, the Service and National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS), the federal agencies responsible for administering the ESA, have worked with state agencies, federal agencies, local government, tribes, private landowners, and the public to promote the conservation and prevent the extinction of the nation's imperiled species. Under the ESA, the Department of the Interior's Fish and Wildlife Service is primarily responsible for terrestrial and fresh water species; the Commerce Department's National Marine Fisheries Service has the lead responsibility for most marine and anadromous species, such as salmon, that spend parts of their life cycles in both saltwater and freshwater. This work plan covers only species with jurisdiction by the Fish and Wildlife Service.

Why has there been so much litigation related to the ESA?

The ESA allows citizens and groups to petition for species to be added to the federal list of threatened and endangered species — as well as to be removed from the list — and sets specific statutory timelines for responding to those petitions. Unlike most other federal laws, the ESA contains a broad citizen-suit provision that enables groups and individuals to sue to enforce these deadlines, as well as to challenge other listing-related decisions such as critical habitat designations. Limited resources and an ever-increasing workload have led to litigation over nearly every aspect of the listing program. Litigation obligations have made it difficult for the Service to manage its workload based on biological priorities.

How many petitions have been filed?

In recent years, the Service has experienced a very large increase in the number of species petitioned for listing. The Service was petitioned to list an average of 20 species per year from 1994 to 2006. By contrast, since 2007, the Service has been petitioned to list more than 1,250 species, nearly as many species as the agency listed during the previous 30 years of administering the ESA. The Service was petitioned to list 695 species in 2007, 56 species in 2008, 63 species in 2009, and 451 species in 2010.

Three petitions, termed “mega-petitions,” simultaneously petitioned hundreds of species for review. The deadlines for responding to this large increase in petitions, driven in large part by these mega-petitions, have overwhelmed the capacity of the Listing Program and required diverting significant human and financial listing resources to the task of completing findings for the petitioned species, to such an extent that no new listing determinations were initiated in FY 2010. The Service published final listing determinations for 51 species in FY10, and 13 species in FY11. Most were listed with a concurrent critical habitat designation.

How has the Service developed this work plan?

In an effort to get beyond the litigation preventing the Service from addressing the needs of species on the Candidate List, the Service initiated the consolidation and transfer of pending petition deadline lawsuits from a number of different district courts to the U.S. District Court for the District of Columbia so that the agency’s workload could be considered in a more comprehensive manner. The Service recently reached an agreement with WildEarth Guardians, a frequent plaintiff in Endangered Species Act lawsuits, which will allow the agency to focus its resources on the species most in need of the ESA’s protections. To that end, the Service developed a schedule that will allow it to evaluate each of the 251 species on the 2010 Candidate List, as well as make petition findings for a number of other species that have been the subject of recent petitions, within the next six years.

Why has the Service initiated this work plan?

The priority of the Service is to make implementation of the ESA less complex, less contentious, and more effective. The work plan will allow the Service to focus efforts on species most in need of protection. Most listing actions outlined in the agreement’s work plan are for species that the Service has already determined to warrant a listing proposal.

In the absence of court approval of this work plan, the Service lacks the discretion to balance its workload among the different categories of listing and critical habitat determinations and to follow its own priorities based on conservation needs of the species when faced with the mandatory statutory deadlines. Because there is no statutory deadline for initiating new listings, proposed listing determinations have had to fall behind compliance with court orders, settlement agreements, and statutory deadlines when competing for available staff time and funding. To date, the only effective balancing mechanism — although limited and imperfect — has been through language in the annual Interior appropriations acts that allocate the amount of money the Service can spend on critical habitat designations for already listed species and on the Listing Program nationally. Because there is no statutory deadline for initiating new listings, proposed listing determinations must fall behind compliance with court orders, settlement agreements, and statutory deadlines for petition findings when competing for available staff time and funding.

What is a candidate species, and what is the Candidate Notice of Review?

The Service maintains a list of candidate species, and publishes a notice about this list annually, which is referred to as the Candidate Notice of Review. A candidate species is one for which the Service has determined that a proposal to list as endangered or threatened is warranted.

A species may be identified by the Service as a candidate for listing based on an evaluation of status of the species that the agency conducts on its own initiative, or as a result of finding, in response to a petition to list a species, that listing is warranted but precluded by other higher priority listing actions.

For a variety of reasons, the Service has not been able to list species and designate critical habitat at the same rate that new species are added to the candidate list. As a result, the 2010 Candidate Notice of Review identified 251 species that warrant a listing proposal, but are not yet fully protected by the ESA. For more information visit:

<http://www.fws.gov/angered/what-we-do/index.html>

How does the Service determine if a species should be listed?

Before a plant or animal species can receive the protection provided by the ESA, it must first be added to the federal lists of threatened and endangered wildlife and plants. The List of Endangered and Threatened Wildlife (50 CFR 17.11) and the List of Endangered and Threatened Plants (50 CFR 17.12) contain the names of all species of mammals, birds, reptiles, amphibians, fishes, insects, plants, and other creatures that have been determined by the Service and the NMFS (for most marine life) to be in the greatest need of federal protection.

The best available information regarding a species is considered and evaluated using the following five factors provided in the ESA:

- The present or threatened destruction, modification, or curtailment of its habitat or range;
- Overutilization for commercial, recreational, scientific, or educational purposes;
- disease or predation;
- The inadequacy of existing regulatory mechanisms;
- The natural or manmade factors affecting its survival

A species is added to the list when it is determined to be endangered or threatened because of any one of these five factors. The listing process uses the best available scientific and commercial data and peer-review to ensure sound science and sound decision-making. The Service or NMFS must publish in the *Federal Register* a notice of any proposal to list a species as endangered or threatened and respond to public comment, and ordinarily must complete a final rule within one year of the proposed rule. For more information on the listing process visit:

<http://www.fws.gov/angered/what-we-do/listing-overview.html>

How does a species become listed under the ESA?

A species can be considered for listing in two different ways: through the petition process or through the candidate assessment process. The ESA provides that any interested person may petition the Secretary of the Interior to add a species to, or to remove a species from, the list of endangered and threatened species. The ESA also provides for the Fish and Wildlife Service to identify through the candidate assessment process any species that may warrant listing. Regardless of which way a species is brought into consideration for listing, the actual listing determinations are made through a rulemaking process, with determinations published in the *Federal Register* for public notice and comment.

The public's right to petition the Service to list species is provided by the ESA, and is an integral aspect of endangered and threatened species protection. However, because the Service does not have the capability to postpone action on petitions or to balance that work effort with other Listing Program duties, receipt of increasingly large numbers of complex petitions is overwhelming the Listing Program's staffing resources.

Any delay in publishing a 90-day or 12-month petition finding within the ESA's statutory deadlines has the potential to lead to litigation.. Because satisfying court orders or court-ordered settlements is the Service's highest funding priority, these deadline cases concomitantly raise the petition findings in the agency's priority for funding and encumber listing program resources that would otherwise be available to list candidate species that are known to warrant protection under the ESA.

What is critical habitat?

When a species is proposed for listing as endangered or threatened under the ESA, the Service must consider whether there are areas that meet the ESA's definition of "critical habitat." The Service may propose to designate those areas as critical habitat if it is prudent to do so. The determination and designation of critical habitat is one of the most controversial and confusing aspects of the ESA.

An area designated as critical habitat is not a refuge or sanctuary for the species. It is a specific geographic area(s) that contains features essential for the conservation of a threatened or endangered species and that may require special management and protection, or that is otherwise essential to the conservation of the species.

Federal agencies are required to consult with the Service on actions they carry out, fund, or authorize to ensure that their actions will not destroy or adversely modify critical habitat. In this way, a critical habitat designation protects areas that are necessary for the conservation of the species. A critical habitat designation generally has no effect on situations that do not involve a Federal agency—for example, a private landowner undertaking a project that involves no Federal funding or permit.

<http://www.fws.gov/endangered/what-we-do/critical-habitats-faq.html>

How does the Service determine what areas to designate as critical habitat?

Biologists consider physical and biological features needed for life processes and successful reproduction of the species. These include:

- space for individual and population growth and for normal behavior;
- cover or shelter;
- food, water, air, light, minerals, or other nutritional or physiological requirements;
- sites for breeding and rearing offspring; and
- habitats that are protected from disturbances or are representative of the historic geographical and ecological distributions of a species.

How many species have critical habitat designations?

As of January 14, 2011, critical habitat has been designated for 603 of the 1,317 U.S. species listed as threatened or endangered.

What are the terms of the agreement that will enable the Service to implement its work plan?

Under the agreement, WildEarth Guardians has agreed to dismiss pending lawsuits and refrain from initiating new listing deadline-related litigation until March 30, 2017, and limit the number of species that it petitions to list to no more than 10 per year. The Service will use this respite from litigation to devote the full resources of the listing program to developing listing determinations for each of the 251 species listed in the 2010 Candidate Notice of Review, and concurrent critical habitat determinations

for those species listed. Completing all of these determinations is expected to take up to six years. During the six-year period, the Service will issue proposed listing rules or not-warranted findings for each of the 251 species, and, for any species proposed for listing, will make final listing determinations within one year.

What if other groups continue to file lawsuits for missing deadlines on petition findings?

The Service and the Department of Justice will use their best efforts to ensure that other litigation does not interfere with the agency's ability to satisfy the obligations in the 6-year Listing Program work plan, and may seek to consolidate other litigation into the consolidated Multi-District Litigation (MDL) case now before the U.S. District Court for the District of Columbia. The Service hopes that its binding commitment to address the candidate backlog will encourage potential litigants to refrain from filing additional lawsuits.

Can the Service terminate the agreement?

If the number of species petitioned each fiscal year increases substantially from the historic levels, the level of deadline litigation isn't significantly reduced, or the Service is required to comply with a significant number of additional court orders, such that the Service is no longer able to implement the work plan, the Service can terminate the Agreement.

Will the implementation of the Work Plan affect resources devoted to recovery and consultation under Section 7 of the ESA?

This agreement will enable the Service to use its current listing program resources more efficiently and effectively. It will not require or allow the Service to use funding or staff time devoted to recovery of listed species and/or consultations with federal agencies under Section 7 for listed species. These and other components of the Service's Endangered Species program are funded under separate line items in the federal budget. Any reprogramming of these funds would require congressional approval and would detract from these equally important functions of a balanced Endangered Species program.

As part of implementing this work plan, will the Service change how it administers the ESA?

The implementation of the work plan will allow the agency to improve the effectiveness of the ESA at conserving imperiled species and more efficiently administer the ESA in a productive manner.

At the direction of Secretary of the Interior Ken Salazar, the Service has also begun a review of its implementation of the ESA to identify ways to eliminate unnecessary procedural requirements, improve the clarity and consistency of regulations; engage the states, tribes, conservation organizations, and private landowners as more effective conservation partners; encourage greater creativity in the implementation of the Act; and reduce the frequency and intensity of conflicts as much as possible. The Service will actively engage conservation partners and the public in the search for improved and innovative ways to conserve and recover imperiled species.

By taking action to protect imperiled native fish, wildlife and plants, together we can ensure a healthy future for our community and protect treasured landscapes for future generations.

Where can I find more information?

To learn more about the listing work plan and the Service's Endangered Species program, visit online at: http://www.fws.gov/endangered/improving_ESA/listing_workplan.html.