

# CRS Issue Brief

## Endangered Species Act Issues

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## Endangered Species Act Issues

### SUMMARY

The Endangered Species Act of 1973 (ESA -- P.L. 93-205, as amended; 16 U.S.C. 1531-1543) is widely regarded by its proponents as one of this country's most important and powerful environmental laws and an international model. However, divergent views on the relative worth and workability of the Act have been expressed by conservationists, business groups, State game and fish officials, the Federal Government, and others. Since the authorization for spending under ESA expires on Oct. 1, 1992, reauthorization hearings may raise a variety of issues.

Critics of the ESA cite a variety of current controversies, from spotted owls and salmon in the Pacific Northwest to red-cockaded woodpeckers and sea turtles in the Southeast. They perceive a lack of balance in the statute and request a variety of solutions. In the past, most critics have sought ad hoc solutions, rather than fundamental changes in the Act. The most recent example is the exemption of certain 1991 Bureau of Land Management (BLM) timber sales from ESA's protection for the threatened spotted owl. The more general approach currently focuses mostly on two areas: consideration of economic consequences of listing, and compensation to owners whose perceived property rights could be affected by the ESA. Because defenders of the ESA generally view it as a vital cornerstone of environmental law, they oppose most changes in the law itself: in their view, the balance of Federal laws has already tilted too far away from conservation. So far, these controversies have not focused on any one piece of legislation.

The Act is the domestic implementing legislation for U.S. obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), but there has been little debate over general treaty responsibilities. Through P.L. 100-478, Congress made relatively small changes in existing protections, addressed a few very specific issues, added some new protections for various species (especially elephants), and increased the authorizations for new and existing programs gradually to \$75 million in FY1992.

As in the past, much of the debate over endangered species centers on particular species; currently controversial species include the spotted owls of the U.S. Pacific Northwest, certain salmon runs in the Columbia River basin, Mt. Graham red squirrels in Arizona, gray wolves in the Yellowstone ecosystem, and African elephants. The BLM timber sale exemption, while it was a regulatory decision, has also been followed closely by congressional observers.



## ISSUE DEFINITION

The Endangered Species Act has been amended on numerous occasions in response to criticism and to unique conflicts resulting from efforts to protect particular species. Currently, the issue is the law's stringent protection of certain controversial species. Some critics maintain that the ESA goes too far in considering biology to the exclusion of economics. Others argue that it merely balances other existing laws. These protections have constrained (though rarely stopped) a number of actions by Federal agencies. As a result, the Administration proposed changing the Act, in order to allow greater consideration of economic factors in actions to protect a species. In one highly controversial move, the Bureau of Land Management was granted an exemption from the Act on May 14, 1992, for 13 FY1991 timber sales within spotted owl habitat. Other controversies involve Pacific salmon, California gnatcatchers, Mt. Graham red squirrels, Colorado squawfish, African elephants, and gray wolves. Some of these specific controversies are described below. Since the authorization expires on Oct. 1, 1992, some of these issues may be raised in hearings during the 102d Congress.

## BACKGROUND AND ANALYSIS

The 1973 Endangered Species Act began as a comprehensive attempt to protect all species and to consider habitat protection as an integral part of that effort. Under the Endangered Species Act, 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. As of Jan. 31, 1992, 1,209 species of animals and plants (of which 681 occur in the United States and its territories) had been listed as either endangered or threatened.

The ESA has proven to be a potent legal tool to protect declining species and as a result sometimes to slow, alter, or (rarely) halt various projects that can affect species adversely. However, while the ESA protects listed species, there may be no comparable program to list and protect "endangered ecosystems" or whatever other values are threatened by a particular activity. As a result, some critics argue that environmental groups are "just using" the ESA to block other actions. Leaving aside the pejorative connotations, this assertion is clearly accurate in a number of cases; conservationists argue, however, that laws should exist to protect these other values as well. In the debate concerning the northern spotted owl and Federal timber harvests, for example, all sides agree that the owl is simply the most visible symbol of the larger debate over logging and the fate of old growth forests. As a result of such controversies, the Act has come under attack in the past, and the issue may well be raised during the reauthorization process.

If the ESA is not reauthorized before Sept. 30, 1992, **there will be little practical effect:** a number of laws (e.g., the Clean Air Act, and the ESA itself in the mid 1980s) were not reauthorized for various periods, but continued in force. **The key is Congress' willingness to continue to appropriate money in the absence of an authorization.** The ESA lapsed for 2 years (1986-88) without reauthorization, but is it doubtful that the public felt any practical effect of that lapse. Although



enforcement may be slowed, even without appropriations the penalties and prohibitions of the Act would remain in force unless Congress chooses to repeal them.

## Major Provisions of the Current Law: Domestic

The Endangered Species Act (ESA; 16 U.S.C. 1531-1543) was passed in 1973, but was preceded by simpler acts in 1966 and 1969. It has been amended on numerous occasions since then: 1976, 1977, 1978, 1979, 1980, 1982, and 1988. The following are the major **domestic** provisions of the Endangered Species Act:

1. An **endangered species** is defined as "any species which is in danger of extinction throughout all or a significant portion of its range...." A **threatened species** is defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." It is important to note that the ESA does not rely on a numerical standard: such a standard would not reflect the wide variety of many species' biology. (For example, a population of 10,000 butterflies, all confined to one mountaintop, would clearly be at greater risk than 10,000 butterflies scattered over thousands of square miles.) The protection of the Act extends to all species of animals (not just birds or mammals), although for vertebrates, further protection is given even for distinct populations within a species, and not just the species as a whole. More limited protection is available for plant species under the Act. (16 U.S.C. 1532)
2. Protection of most species is administered by the Secretary of the Interior through the Fish and Wildlife Service (FWS). However, marine species, including many marine mammals, are the responsibility of the Secretary of Commerce, acting through the National Marine Fisheries Service (NMFS). The law assigns the major role to the Secretary of the Interior (and all references to "Secretary" below concern the Secretary of the Interior unless otherwise stated), and provides in detail for the relationship of the two Secretaries and their respective powers. (16 U.S.C. 1533)
3. When the appropriate Secretary initiates or receives a substantive petition from a party (which may be a State or Federal agency (including FWS or NMFS), a private person, or some other entity), and after an extensive series of procedural steps intended to ensure public notice and participation and the collection of information, the Secretary must make a decision on whether to list a species, based only on the best scientific information and trade statistics. The Secretary *may not take into account the economic effects that listing may have on the area where the species occurs.* (See CRS Report 89-274, *Consideration of Economic Factors under the Endangered Species Act*, for an analysis of when the ESA does allow consideration of such factors.) Some of the steps may be skipped in order to list a species on an emergency basis. (16 U.S.C. 1533). Economic factors are not taken into account at this stage because Congress felt that listing was fundamentally a scientific question: is the continuation of the species threatened or endangered? Through the 1982



amendments particularly, Congress intended to separate this scientific question from the subsequent decision on appropriate protection measures.

4. In the interval between the proposal and any actual listing, the Secretary must monitor the status of these "candidate" species, and promptly list them to prevent significant risk (16 U.S.C 1533). Furthermore, agencies must confer with the Secretary on any agency actions likely to jeopardize the continued existence of the species proposed to be listed. However, the agencies are not required, at this stage, to avoid irretrievable commitments of resources (16 U.S.C. 1536).
5. If the species is listed, the Secretary must designate critical habitat (where the species is found and where there are features essential to its conservation) at the time of listing. However, if the publication of this information is not "prudent" because it would harm the species (e.g., by encouraging vandals or collectors), the Secretary may decide not to designate critical habitat. The Secretary may also decide not to designate critical habitat at the time of listing on the grounds that the information is not determinable. If so, the Secretary has up to one year to make such a designation. (16 U.S.C. 1533) There are no firm guidelines on activities which may occur in critical habitat; agencies are directed to avoid "adverse modification," however. As a practical matter, critical habitat has not been designated for many listed species.
6. The appropriate Secretary must develop recovery plans outlining the agency's strategy to assist the species to recover. The Secretary may not favor particular taxonomic groups. (Recovery plans to date tend to cover birds and mammals.) (16 U.S.C. 1533)
7. Land may be acquired to conserve endangered and threatened species, and money from the Land and Water Conservation Fund may be used for this acquisition. (16 U.S.C. 1534)
8. The appropriate Secretary must cooperate with the States in conserving the protected species, and must enter into cooperative agreements to assist States in their endangered species programs, provided that 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 is 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)
9. After consulting with the appropriate Secretary, Federal agencies must ensure that their actions are "not likely to jeopardize the continued existence" of any endangered or threatened species. "Action" is quite broadly defined: it includes anything authorized, funded, or carried out by the agency. Permits and licenses are included. If the Secretary finds the action would jeopardize the species, he must suggest any reasonable



and prudent alternatives that would avoid harm to the species. Agencies may not make irreversible commitments of resources that would foreclose any of these alternatives. (16 U.S.C. 1536)

10. Proponents of an action may apply for an exemption *for that action* (rather than for a species) from the Act. Under the ESA, a Committee of six specified Federal officials and a representative of the affected State(s) must decide whether to allow a project to proceed in spite of future harm to a species; at least five votes are required to pass an exemption. The law includes extensive rules and deadlines to be followed in applying for such an exemption. It also includes some stringent rules that must be applied by the Committee in deciding whether to grant an exemption. 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) (For further discussion, see CRS Reports 89-274 A, and 90-242 ENR.)
11. Other provisions of the law specify certain exemptions from the Act for raptors; regulate subsistence activities by Alaskan natives; control parts or products of an endangered species that were owned before the law went into effect; and specify rules for the establishment of experimental populations, among other specialized provisions. (Other provisions of the Act referring to international cooperation and activities are discussed below.) (16 U.S.C. 1539)
12. Criminal and civil penalties are specified for violations of the law. (16 U.S.C. 1540)

### **Major Provisions of the Current Law: International**

The ESA implements, for the United States, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, or "CITES" (TIAS 8249), signed by the United States on Mar. 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 Oct. 12, 1940. CITES is somewhat similar to the ESA, in that it divides its listed species into groups, according to the estimated risk of extinction that the species faces. CITES uses three major categories, rather than two. In contrast to ESA, however, CITES focuses exclusively on trade, and does not consider or attempt to control habitat loss. The following are the major **international** provisions of the Endangered Species Act:

1. The Secretary may use foreign currencies (available under 7 U.S.C. 1691, the Food for Peace program under P.L. 83-480) to provide financial assistance to other countries to assist them in conserving endangered species. (As a practical matter, however, very little money is currently available under this provision.) The Act also authorizes appropriations for this purpose. (16 U.S.C. 1537 and 1542).
2. The Act designates the Interior Secretary as the Endangered Species Scientific Authority (ESSA) under CITES. As the Scientific Authority,



the Secretary must determine that export from the United States and import from other countries of living or dead organisms, or their products, will not harm the species in question. Formerly, the ESSA was a 7-member independent panel with regulatory authority, but not accountable to any public official. The ESA was amended, stripping the 7-member panel of regulatory authority, and the panel was later abolished. The Secretary now has the enforcement authority ESSA formerly had. The Secretary is required to base export determinations upon "the best available biological information." For this determination, the law states that population estimates are not required as part of the data needed. Certain other responsibilities are also spelled out in CITES. (16 U.S.C. 1537-1538)

3. The Interior Secretary is also named as the Management Authority for the United States under CITES. The Management Authority must assure that specimens are exported legally and that imported specimens left the country of origin legally. The Authority must also assure that live specimens are shipped under suitable conditions. Certain other responsibilities are also spelled out in CITES. (16 U.S.C. 1537)
4. 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)
5. The ESA requires importers and exporters of controlled products to use certain ports, and provides for exemptions for scientific purposes and for programs intended to assist the recovery of listed species. There are also certain exemptions for Alaska natives, and for products owned before Dec. 28, 1973, including scrimshaw. (16 U.S.C. 1538-1539)
6. The 1988 amendments create a major program for the conservation of African elephants. (See **Conservation of African Elephants** below.)

### **Proposed Amendments**

To bring economic factors into play earlier (including in the listing process), three bills (H.R.3092 -- Hansen; H.R. 4058 -- Dannemeyer; and H.R. 5105 -- Chandler) have been introduced. Using somewhat different mechanisms, they require balancing of economic costs and benefits of action (including listing) taken under the act. H.R. 5105 also requires a variety of other changes, including (among other things) facilitating use of the exemption process, limiting the protections offered to threatened species, requiring a peer review of listing proposals, and limiting the listings of subspecies and populations. All of these bills also reflect a concern among some parties that the owners of land on which an endangered species is found suffer a financial loss. They argue that due to the possible restrictions on management of the land, the resulting loss in value constitutes a Federal taking of property and should be compensated. (See CRS Rept. 91-339ALD.)

H.R. 4045 (Studds) would reauthorize the Act through FY1997. The bill provides for changes in the adoption and implementation of recovery plans, the timing of citizen suits, and creation of a fund for developing habitat conservation plans. Because of the



controversy surrounding ESA, many observers predict that it will not be reauthorized until the 103rd Congress.

Interior Secretary Manuel Lujan created a group to study ways to preserve timber harvests in the Pacific Northwest, even if the group's proposals would violate the ESA. On May 14, 1992, this group recommended an alternative to the recovery plan required under ESA. For this plan to be effected, either the ESA would have to be amended directly or enabling legislation would have to exempt the proposal from the ESA (and probably certain other laws as well).

## Appropriations

**Table 1** shows the FY1990-FY1992 funding for the program within the Fish and Wildlife Service, and the FY1993 President's request.

**TABLE 1. Appropriations to the Fish and Wildlife Service  
for Endangered Species, FY1990-FY1993**  
Appropriation (\$ in thousands)

Activity	FY1990 Enacted	FY1991 Enacted	FY1992 Enacted	FY1993 President's Request
Pre-listing <sup>a</sup>	--	--	--	\$ 4,654
Listing	\$ 3,266	\$ 4,272	\$ 7,378	\$ 6,603
Consultation	3,724	5,204	8,130	8,537
Permits	858	889	1,199	1,976
Recovery	10,012	12,491	19,045	19,987
Grants to States	5,750	6,671	6,621	5,700
Non-game Management	250	--	--	--
Spotted Owls	--	1,050	--	--
<b>Total</b>	<b>\$23,860</b>	<b>\$30,577</b>	<b>\$42,373</b>	<b>\$47,457</b>

a/ This category of funding was included under Listing before FY1993.

Until recently, NMFS did not separate its expenditures under ESA from its expenditures under the Marine Mammal Protection Act (MMPA) and certain other programs. Budgeting changes now permit clearer identification of ESA expenditures, though comparisons with earlier years are difficult. Even so, allocation must be a bit arbitrary for some species. For example, law enforcement activities to prevent harassment of gray whales could result in convictions under both ESA and MMPA. Table 2 shows appropriations for ESA activities for FY1992 and FY1993 under the new system.



**Table 2. Appropriations to the National Marine Fisheries Service for  
Endangered Species, FY1992 - FY1993**  
Appropriation (\$ in thousands)

Activity	FY1992 Enacted	FY1993 President's Request
Resources Information	\$6,298	\$4,266
Information Analysis and Dissemination	191	204
Fisheries Management	299	0
Protected Species Management	1,392	3,922
Enforcement and Surveillance	<u>274</u>	<u>297</u>
<b>Total</b>	<b>\$8,454</b>	<b>\$8,689</b>

Funding has been among the most controversial issues surrounding the ESA. Proponents of the ESA have sought larger appropriations and greater effort to speed listing of additional species believed to require protection. In addition, they argue more resources should be devoted to developing recovery plans and designating critical habitat. Many observers would agree that the agency's current responsibilities cannot be met under the current budget -- at least not in a timely manner.

### **Species Down, But Not Out**

Some species have been the focus of debate during the history of the Endangered Species Act. In the past such species have included the snail darter, the Furbish lousewort, the American alligator, and the bobcat. Briefly discussed below are a few species that illustrate general and current concerns in the debate over endangered species management.

#### **Northern Spotted Owl (*Strix occidentalis caurina*)**

FWS listed this species as threatened, effective July 23, 1990. Northern spotted owls are confined largely to the 250+ year old forests ("old growth" or "ancient forests") from British Columbia to northern California. The owl's complex biology requires not only sufficient old growth, but also a habitat distribution that will allow dispersal of young. Because of their restricted habitat, these owls are an indicator species for the existing balance of this ecosystem. The timber in these habitats, now restricted mostly to Federal lands (managed by the Forest Service, the Bureau of Land Management (BLM), and the National Park Service), is highly prized by the timber industry. Timber interests, especially many sawmill owners, argue that their businesses are being damaged by measures to protect owls, but others argue that much of the damage is due either to the recession or other factors.



The debate took a new turn on Sept. 11, 1991, when BLM applied to the Interior Department to exempt 44 of its FY1991 timber sales in Oregon from the ESA. The Interior Secretary determined that the BLM application met the preliminary requirements for consideration, and consequently convened the Endangered Species Committee (sometimes called the "God squad") to consider it. (For more general information on spotted owls, see CRS Issue Brief 90094; for specific information on the exemption process, and on the two instances in which the process has been used, see CRS Rept. 90-242.) Future timber sales or other activities in the region could be constrained as FWS attempts to meet its continuing responsibility under the ESA to avoid jeopardy to the owl. This result could put the timber industry in a dilemma: jobs saved in a successful exemption application could later be lost as the FWS makes up elsewhere for the harm done to the owl by the exemption.

After various delays, the Endangered Species Committee (sometimes called the "God Committee") was called, and received the Secretary's report on the application on Apr. 15, 1992. The decision was issued on May 14, when the draft recovery plan and its alternate were also released. (Representative Studds, Chair of the Subcommittee on Fisheries and Wildlife, requested a GAO investigation of this exemption application.)

After a review of background information, the Chair of the Committee, Secretary Lujan, proposed that 31 sales should not be exempted: 11 had reasonable and prudent alternatives; 12 were in critical habitat or in designated conservation areas under the recovery plan; and 8 were not of regional significance. (None was claimed to be of national significance.) He proposed to exempt the remaining 13.

Dr. John Knauss, Administrator of NOAA (and, ex officio, a member of the Committee) expressed strong reservations about the proposal, and offered an amendment to the Chairman's proposal. He argued that to prevent the reappearance of BLM timber sales before the Committee, it was necessary to adopt a long-range plan. By a vote of 5-2, the Committee accepted his amendment to (1) implement the final recovery plan as expeditiously as possible; (2) use the recovery plan as the basis for its 10-year plan, consistent with the best scientific and commercial data available (including the ISC report); (3) submit its 1993 and 10-year timber plans to FWS for consultation as a whole; and (4) cease offering timber sales *"until the decadal plan has gone through a 60-day comment period and has been approved by DOI."* If delays in approval of the plans beyond the control of DOI occur, then sales may be offered if they are consistent with the recovery plan. (See CRS Rept. 90-242 for more on the exemption process.) After the vote on this mitigation, the Committee adopted the Lujan proposal, as amended by Knauss, by a vote of 5-2.

Some observers have suggested that BLM may wish to "reject" the decision altogether, in light of the mitigation requirements which it may consider unacceptable. The ESA does not appear to contemplate such an event, and it is not clear whether the agency has the choice of rejecting the outcome of the Committee's deliberations. To date, BLM has made no statement on its decision.

### **Pacific Salmon Species**

Early in 1990, petitions were filed with the NMFS to list several wild salmon populations in the Columbia River basin. Affecting much of the same area as spotted owls, salmon listings promise to be at least as controversial as the owl listing and could



affect broader segments of the Northwest's economy. The construction of dams for irrigation and/or power generation has damaged salmon habitat, either by blocking stream access to salmon migration entirely, or by reducing the numbers of adults successfully reaching native spawning areas or of young fish swimming down past the dams and their impoundments. Without the genetic variability of wild fish, hatchery populations become inbred, and thereby susceptible to a variety of ailments. Protection of these wild runs could involve restrictions on hydropower generation, marine and lower river harvests, tribal fisheries, hatchery programs, irrigation, shipping, flood control, and other interests. Restrictions on hydropower could be particularly far-reaching, since higher electricity rates would affect home heating and the aluminum and aircraft industries -- all dependent on relatively cheap hydropower.

On Nov. 5, 1990, NMFS listed Sacramento River (California) winter chinook salmon as threatened. In November 1991, NMFS listed sockeye salmon in the Snake River drainage as endangered. This run suffered a near total collapse over the last 50 years. On Apr. 22, 1992, NMFS listed spring, summer, and fall chinook salmon in the Snake River as threatened. (For further information, see CRS Report 91-267, and CRS Issue Brief 91112.)

### Sea Turtles

Most species of sea turtles are protected under the Endangered Species Act. A report by the National Academy of Sciences found shrimp trawlers to be the major human-caused source of turtle mortality: air-breathing sea turtles become caught in shrimp trawl nets and drown. On June 29, 1987, NMFS promulgated regulations (52 FR 24244) requiring that shrimpers modify their nets by adding turtle excluder devices (TEDs) to increase the chance that turtles will escape. NMFS argued that the new design will still allow a good shrimp harvest, but shrimpers have fought these regulations on the grounds of cost, lower harvest efficiency, and safety. NMFS proposed expanded TEDs regulations on Apr. 30, 1992.

The ESA amendments of 1988 became a vehicle for addressing this controversy: in the 101st Congress, the House agreed to a Senate provision which (1) delayed the effective date of the regulations until May 1, 1989, in offshore areas and until May 1, 1990, in inshore areas; and (2) required an independent review of scientific information regarding sea turtles. Implementation on May 1, 1989, of the regulations was contested, an interim rule promulgated, and lawsuits filed. (For further information, see CRS Report 90-327 ENR, *Turtle Excluder Devices: Sea Turtles and/or Shrimp?*) More recently, Section 610 of P.L. 101-162 prohibited shrimp imports after May 1, 1991, from nations which lack comparable programs for protecting sea turtles. Currently, Mexico is the largest source of imported shrimp: the State Department believes that Mexico is complying with the requirement, and guidelines for implementing these provisions allow ample time for compliance. On Feb. 24, 1992, the Earth Island Institute filed suit to force Federal sanctions against as many as 65 foreign nations harvesting shrimp.

### Wolves (*Canis lupus*)

The gray wolf is listed as endangered in 47 States. Conservationists have proposed reintroducing the species to the Yellowstone ecosystem. They argue that the species is the only major native vertebrate missing from the world's first National Park, and



therefore should be returned. Some argue that the return of a major predator may help to control unusually high populations of elk and bison. Opponents counter that wolves would not remain in the park, would attack stock animals, especially sheep, and might even represent a threat to humans. While some Park officials have supported reintroduction, other DOI officials remain opposed. P.L. 101-512 (FY1991 Interior Appropriations) directed the formation of a Wolf Management Committee to develop a wolf re-introduction and management plan for Montana, Wyoming, and Idaho. The Committee recommended, among other things, that wolves should be considered as an experimental population in certain areas in the three States and managed by the States under congressional sanction. This plan would recognize the right of the States to manage unacceptable impacts on livestock. The Senate version of the FY1992 Interior appropriations bill contained a provision directing that \$348,000 go to the Fish and Wildlife Service to write an Environmental Impact Statement on wolf re-introduction. The move was supported by both cattle interests and wolf enthusiasts. In the meantime, wolves have been sighted more frequently south of the U.S.-Canada border, and some argue that it is only a matter of time before wolves re-introduce themselves into the Yellowstone ecosystem. There are recent reports of a single wolf being sighted in the area.

### **African Elephants**

The African elephant is currently listed as a threatened species, but on Feb. 16, 1990, FWS announced that it was considering listing it as endangered over most of its range. The decision has been delayed, but an announcement is expected in spring 1992. Concern increased that the market for elephant ivory had contributed to a rise in poaching. Title II of P.L. 100-478 (1) prohibits ivory imports from producing nations whose elephant conservation programs do not meet the standards set in P.L. 100-478; (2) stops imports from non-producing countries (including especially Hong Kong) that accept ivory from prohibited countries; (3) creates an African Elephant Conservation Fund (requiring annual appropriations) to assist projects for research, conservation, management, or protection of African elephants. In addition, the law requires the Secretary to gather information on African elephants and to make annual reports to the Congress on implementation of the law. The law also sets penalties for violations.

The African elephant was listed as an Appendix I species under CITES. This most protected classification prohibits international trade in the species between two Parties, and even between a Party and a non-Party state. However, CITES does allow signatory states to take a reservation from the treaty; some African states have already taken reservations. Interestingly, Japan, the largest single importer of ivory, announced on Oct. 30, 1989, that it would observe the CITES ban. However, Japanese ivory carvers stockpiled over 100 tons of raw ivory, so effects on their domestic markets were not immediate. The British government on behalf of Hong Kong took a 6-month reservation on the listing. The delay allowed Hong Kong merchants to sell their ivory stocks to non-party states, but they were not particularly successful. Some observers expressed concern over reports of plans to sell this ivory to dealers in the People's Republic of China, but these plans have not been carried out to date.

At the 1992 meeting of CITES, Zimbabwe, Malawi, Namibia, and Botswana proposed easing the ban on trade to allow the sale of hide and meat of animals culled from the relatively large herds in these nations. Most signatories opposed the move, saying that it would encourage poachers just when the international ban had begun to



show success. When it became apparent that the proposal would lose, the four nations withdrew the proposal. As result of the ban, the price of ivory has plummeted, and dealers are finding it hard to sell at any price.

## **Hybrids**

There is, at times, a tension between the legal needs for clarity and the blurred boundaries of biology. One of the areas of tension is the conservation of populations that have a substantial amount of hybridization. Some degree of hybridizing between neighboring populations of the same species is normal, but between widely separated populations (in the genetic or geographical sense) it is extremely unusual. The ESA says a species "includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." What happens when members of the population have interbred with individuals of other populations or other species?

This dilemma has arisen for a few populations. Genetic studies have shown that endangered Florida panthers have interbred with seven captive animals that were released into the Everglades over 20 years ago. Some of these released animals were from South American populations. Complicating the problem for the panthers is that the very small population of pure Florida animals is highly inbred and prone to reproductive abnormalities, while these abnormalities are much less common in animals with some South American ancestors. There is also some evidence that wolves in Minnesota have interbred with coyotes. Because of this interbreeding, farmers in Wyoming, Montana, and Idaho petitioned FWS to have wolves de-listed; the petition was rejected. The DOI solicitor has already ruled in a few instances that hybrids did not merit ESA protection. Whether there can ever be a generic solution to this specific problem is not clear.

## **LEGISLATION**

### **H.R. 585 (Scheuer)**

Establishes a national policy for the conservation of biological diversity; supports environmental research, training, and education for conservation and sustainable use of biotic natural resources. Introduced Jan. 18, 1991; referred to Committees on Merchant Marine and Fisheries and on Science, Space, and Technology. Reported (amended) Oct. 21, 1991 (H.Rept. 102-259, Part I).

### **H.R. 1478 (Laughlin)**

Prohibits new restrictions on the taking of shrimp within U.S. waters. Amends IRS Code to provide for a tax credit regarding shrimping when use of a turtle excluder device (TED) is required. Removes criminal penalties relating to the use of TEDs. Provides for a program involving the taking of endangered and threatened sea turtle species eggs for hatching in captivity and return to the wild. Introduced Mar. 19, 1991; referred to Committees on Merchant Marine and Fisheries and on Ways and Means.

### **H.R. 2082 (Studds)**

Establishes the Interagency Working Committee on Biological Diversity to prepare a coordinated Federal strategy for the conservation of biological diversity. Establishes a National Center for Biological Diversity and Conservation Research. Requires the



Secretary of the Interior to protect lands for purposes of maintaining viable populations of plants, animals, and self-sustaining natural communities. Introduced Apr. 24, 1991; referred to Committees on Merchant Marine and Fisheries and on Science, Space, and Technology.

**H.R. 2185 (R. F. Smith)**

Compensates owners for the diminution in property values as a result of Federal actions under ESA and certain other laws. Introduced May 1, 1991; referred to Committees on Merchant Marine and Fisheries; Public Works and Transportation; and Interior and Insular Affairs.

**H.R. 3092 (Hansen)**

Amends ESA to prohibit listing a species unless potential economic benefits of listing outweigh potential economic costs and unless listing complies with an Executive Order concerning property rights and taking of private property. Introduced July 30, 1991; referred to Committees on Judiciary and on Merchant Marine and Fisheries.

**H.R. 4045 (Studds)**

Reauthorizes and amends ESA to speed recovery planning, modify citizen lawsuits, and create a fund for habitat conservation planning. Introduced Nov. 26, 1991; referred to Committee on Merchant Marine and Fisheries.

**H.R. 4058 (Dannemeyer)**

Amends ESA to require economic impact analysis of actions to protect listed species, and for other purposes. Introduced Nov. 26, 1991; referred to Committee on Merchant Marine and Fisheries.

**H.R. 5105 (Chandler)**

Amends ESA to facilitate use of the exemption process, limit the protections offered to threatened species, require a peer review of listing proposals, limit the listings of subspecies and populations, and for other purposes. Introduced May 7, 1992; referred to Committee on Merchant Marine and Fisheries.

**S. 58 (Moynihan)**

Establishes a national policy for the conservation of biological diversity; supports environmental research, training, and education for conservation and sustainable use of biotic natural resources. Introduced Jan. 14, 1991; referred to Committee on Environment and Public Works.

**FOR ADDITIONAL READING**

U.S. General Accounting Office. *Endangered Species: Spotted Owl Petition Evaluation Beset by Problems*. [Washington] 1989. 22 p.  
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U.S. Library of Congress. Congressional Research Service. *Consideration of Economic Factors under the Endangered Species Act*, by Pamela Baldwin. [Washington] 1989. 11 p.  
CRS Report 89-274 ALD



- *Endangered Species Act: The Listing and Exemption Processes*, by M. Lynne Corn and Pamela Baldwin. [Washington] 1990. 29 p.  
CRS Report 90-242 ENR
- *Kangaroo Management Controversy*, by Malcolm M. Simmons. [Washington] 1988. 39 p.  
CRS Report 88-468 ENR
- *Pacific Salmon and Steelhead: Potential Impacts of Endangered Species Act Listings*, by Eugene H. Buck, Amy Abel, Marla L. Kessler, and Elizabeth B. Bazan. [Washington]. 1991. 34 p.  
CRS Report 91-267 ENR
- *Salmon in the Pacific Northwest: Endangered Species Act Listing Proposals and Issues*, by Eugene H. Buck, Amy Abel, and Betsy Cody. [Washington] 1991. (Updated regularly)  
CRS Issue Brief 91112
- *Spotted Owls and Old Growth Forests*, by M. Lynne Corn. [Washington] 1990. (Updated regularly)  
CRS Issue Brief 90094
- *Turtle Excluder Devices: Sea Turtles and/or Shrimp?*, by Eugene H. Buck. [Washington] 1990. 11 p.  
CRS Report 90-327 ENR
- *Whale Conservation*, by Eugene H. Buck and Jennifer A. Heck. [Washington] 1990. 18 p.  
CRS Report 70-283 ENR
- *When the United States Takes Property: Legal Principles*, by Robert Meltz. [Washington] 1991. 147 p.  
CRS Report 91-339 ALD