

# ENDANGERED SPECIES & WETLANDS REPORT

Politics, regulation, and law on ESA, wetlands and takings

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## Calif. counties pulled from vernal species CH based on inflated cost estimates

### Last-minute decision relied on flawed analysis, documents obtained through FOIA show

Internal documents obtained by *Endangered Species & Wetlands Report* through the Freedom of Information Act show that Assistant Secretary for Fish and Wildlife and Parks Craig Manson pulled land in five counties from critical habitat for 15 vernal pool species the day that the final rule was supposed to be submitted to the *Federal Register*.

Manson has previously acknowledged that his decision last July, which cut 700,000 acres from the service’s proposal, was made at the tail end of the rulemaking process (*ESWR* Nov, p. 6). (In all, the final rule was reduced by nearly 1 million acres from the proposal.)

But what close observers of this Administration’s decisionmaking process may find interesting is the faulty analysis relied upon by Manson to exclude the counties.

On July 14, the night before the rule was supposed to be sent to the *Register* to comply with a consent decree, Manson special assistant Julie MacDonald e-mailed him a memo recom-

(Continued on page 2)

## NMFS won’t delist ESUs

### Instead, agency plans to propose “relistings”

NOAA Fisheries has “preliminarily determined” to issue new proposed listing rules for at least 25 of 26 salmon and steelhead ESUs as a result of its status review, Undersecretary of Commerce for Oceans and Atmosphere Conrad Lautenbacher told congressional delegations from California, Oregon, Washington and Alaska in a May 14 letter.

Press reports had painted a picture of an agency equating hatchery fish with wild fish, resulting in the possibility of mass delistings. The catalyst for the coverage was a leaked draft policy document that touted the benefits of hatchery-raised fish.

In a May 7 article on the political ramifications of the decision, the *Washington Post* said the leaked document showed that the “Bush administration had abruptly changed the rules on protecting wild salmon, the semi-sacred indicators of regional identity.”

Environmental groups attacked the Administration for the document, which they said showed NMFS was backing away from earlier statements.

(Continued on page 4)

# Vernal pool species CH

(Continued from page 1)

mending exclusion of the five counties “based on the percent of county land affected and the annual cost of the designation as a percent of total sales per county.” Butte, Madera, Merced, Sacramento and Solano counties are the five.

MacDonald’s analysis consists of nine paragraphs and a chart. In her e-mail to Manson, she said, “Per your instruction I have reviewed the economic effects of the designation on 7 counties based on comments we received from the Small Business Administration and other agencies within the Administration charged with reviewing the final rule.” (Alameda and Placer counties are the other two she looked at.)

SBA and OMB (in e-mails also obtained by *ESWR*), however, said only Solano County should be removed, based on the conclusion in the Fish and Wildlife Service’s economic analysis that most of the costs resulting from the critical habitat designation would occur there.

A close look at MacDonald’s analysis shows that is flawed in at least two respects. First, it used inflated costs by lumping effects attributable to listing with those attributable to critical habitat. The service’s economic analysis broke out the two categories, coming up with a total of \$1.3 billion in costs, approximately \$200 million of which is “attributable to critical habitat.” (The service’s analysis did not produce a number for benefits, an omission being challenged by environmental groups.)

Had she looked at the CH costs alone, MacDonald would not have been able to come up with any impacts for Butte, Madera, Merced, and Sacramento, because the service’s analysis said no costs could be attributed to critical habitat in those counties. Indeed, FWS’s analysis came to the same conclusion for 34 of the 37 counties. The only counties where FWS said critical habitat would cause significant costs were Solano (\$141 million in private land development costs, about 44 percent of the total estimated impact of \$320 million) and Alameda (\$54 million, or 90 percent of the total of \$60.4 million in private land development costs). In Contra Costa County, FWS estimated that CH would cost \$2,000 out of a total of \$2,200.

Secondly, MacDonald compounded her error by underestimating the “taxable sales” in each county by a factor of 1,000. For example, for Butte County, she assumed such sales totalled just \$2 million per year. But Butte County has more sales than that in a single day. The actual figure, according to the California Board of Equalization, is \$2 billion. Predictably, her conclusions were wildly off-base. She told Manson that the annual costs of critical habitat in Butte County “represent 157 percent of the total annual taxable sales.” (Her analysis did not explain how she came to use “taxable sales.”)

The figures for the other counties were equally inflated. In Merced County, for instance, MacDonald told Manson that the annual cost “represents 262.5 percent of the annual taxable sales.” In Madera, it was 139 percent, in Sacramento, 205.6 percent, and in Solano, 362 percent.

“The combination of monetary costs as a percent of the actual economic activity in the area, existing unemployment rate, and area of land affected in the county represents a more specific

picture of the potential economic damage that would flow from this particular designation,” MacDonald said, in language repeated *verbatim* in the final rule that was sent to the *Federal Register* two days later.

“Since the protections of Section 9 will still be in effect, and will result in consultations that will protect the species, the loss in protection of the species will be minimal,” she said.

Somewhere in between the memo and the final rule, however, FWS discovered the error and corrected the percentages, making the impact seem much less onerous. The final rule says that in Butte, “the annual costs represent 0.157 percent of the total annual taxable sales in the county.” In Madera, the figure is 0.139 percent; in Merced, 0.263 percent; in Sacramento, 0.206 percent; and in Solano, 0.362 percent. Nevertheless, the counties remained out.

Defenders of Wildlife and the Butte Environmental Council have sued the service over the designation, alleging that the final decision was arbitrary and capricious. Defenders legal director Mike Senatore said the documents show that the Interior Department “can’t even get their numbers straight.”

The exclusion of the five counties was “fundamentally an arbitrary decision that was not based on anything factual in the record much less on any thoughtful analysis,” Senatore said.

Gary Frazer, FWS’s Assistant Director for Endangered Species, wanted to make sure FWS was doing what Manson wanted before it sent the final rule to him for signature. He asked the assistant secretary in a July 15 e-mail, “would you confirm that you want us to exclude under [ESA Section] 4(b)(2) all CH proposed within the counties recommended in Julie’s note, using the rationale she describes as the basis for the exclusions?”

MacDonald responded about an hour later, saying “the Judge [Manson] wants those counties recommended in my memo to be excluded in the final rule.”

Manson followed with his own e-mail to Frazer a short time later. “That is what I want,” he said.

Neither Manson nor MacDonald would comment, citing the current litigation (*Butte Env’l Council v. Norton*, 04-96, E.D. Cal.). MacDonald was just promoted to the position of deputy assistant secretary for fish and wildlife and parks, where she will continue to report to Manson.

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## Judge declines to vacate Central Valley steelhead listing

A federal judge has kept protections for Central Valley steelhead in place, citing the “apparent substantial threat to the [ESU’s] continued existence” and the likelihood that it will continue to be listed when NMFS’s status review of all salmon and steelhead ESUs is completed (*Modesto Irrigation District v. Evans*, 02-6553 OWW DLB, E.D. Cal.).

The plaintiff irrigation districts, which also include Turlock, Merced and South San Joaquin Irrigation Districts, wanted the fish removed from the threatened list. They contended that enforcement of the listing protections would require them to provide more water for fish and less for farmers and other customers.

Although Wanger decided to retain the threatened designation, he also retained the *status quo*. The districts will not have to provide any more water for fish than they were before.

Wanger ordered the government not to make any changes to FERC licensing requirements until NMFS’s status reviews are finished. If the review isn’t done in a year, then the steelhead listing will be vacated, he said.

The order “doesn’t change our flow schedules in the river,” said Modesto Irrigation District spokesperson Maree Hawkins. The irrigation districts also have to be pleased with the fact that Wanger retained jurisdiction over the matter and will entertain motions for injunctive relief “against any enforcement actions under the flawed rule” while the review is underway.

Wanger also found that hatchery-raised salmon should be considered as part of the same ESU as wild fish, a conclusion reached by Judge Michael Hogan in the *Alsea Valley* case that has forced NMFS to re-evaluate its hatchery policy and conduct status

reviews on salmon and steelhead ESUs in the Northwest.

Environmental groups and fly fishers who had intervened were happy with the decision.

“It’s now up to NMFS to follow the science and continue to protect wild steelhead,” said Kaitlin Lovell of Trout Unlimited. “Steelhead in the Central Valley have been lost from 95% of their historic habitat, and they continue to face threats from unchecked water use, blockage by dams, urban sprawl, and polluted rivers. The bottom line is this: without adequate ESA protection, steelhead recovery simply won’t stand a chance.”

NMFS had argued that removal of the ESU from the list “may have immediate and potentially irreparable consequences . . . including further reduction in the range of the species, degradation, destruction, and blockage of freshwater habitat, and genetic introgression with stocks that are not native to the ESU.”

Wanger said that “[a]lthough excluding hatchery populations from the listing may be ‘consistent’ with the ESA, there is no evidence indicating that the ESA requires or necessitates such exclusion. NMFS’s studies also indicate that hatchery populations could be useful in the recovery of wild steelhead and that when interbred, the two form a distinct genetic group. . . . Intervenors do not provide their own scientific evidence to prove that [NMFS’s] classification was arbitrary, capricious, and unlawful.”

“Assuming that the hatchery fish do pose a threat of harm to the naturally spawned population, there is insufficient evidence to decide whether this threat rises to such a level as to preclude classification of hatchery-spawned population in the same ESU or DPS with naturally spawned steelhead. Even assuming that hatchery fish ‘can pose serious threats’ as intervenors claim, no studies indicate that they do so in this case. Where a significant scientific dispute exists over an issue within the agency’s expertise, deference is ordinarily required.”

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## SBA, OMB recommended pulling Solano, not other four counties, from CH

Assistant Secretary for Fish and Wildlife and Parks Craig Manson went beyond anything recommended by the Small Business Administration or Office of Management and Budget when he pulled five counties from the vernal pool species critical habitat designation last July.

Both OMB and SBA cited the FWS final economic analysis, which concluded that \$141 million of the estimated \$190 million in private development costs resulting solely from CH designation would occur in Solano County. As Ruth Solomon of OMB said in a July 10 e-mail to Manson special assistant Julie MacDonald, Solano accounted for only 0.3 percent of the acres in the designation, yet represented a large percentage of the economic impact. When the effects of listing and CH designation were considered together, the total impact in Solano was \$320 million, according to the FWS economic analysis.

The SBA’s Office of Advocacy also recommended that Solano—but no other counties—be removed. SBA Assistant Chief Counsel Michael See said FWS would “minimize the impacts of this rule by excluding such areas of Solano County which appears to account for the vast majority of costs attributable to critical habitat designation.”

The Office of Advocacy’s annual report released in January touts the exclusion of the five counties, and says SBA recommended that FWS “not designate Solano County, California, and other similarly situated counties as critical habitat because of the potential impacts on small developers and builders.”

The report, issued four months after the final rule was issued, says the decision to exclude Solano “produced cost savings of \$141 million in the first year and annually thereafter.” It adds, “FWS did not have separate estimates for the costs saved from excluding the counties of Butte, Madera, Merced, and Sacramento, so those savings are not quantifiable at this time.”

But the same economic analysis that produced the \$141 million “savings” cited by SBA actually did estimate the impact of critical habitat in the other four counties: \$0. And See did not recommend pulling any other counties besides Solano.

SBA spokesman John McDowell said the annual report is consistent with the e-mail. He also said there “may have been additional communication between our agencies on this issue, but those communications would be deliberative interagency work products and thus beyond our discussion.”

**Web:** More information is at [www.eswr.com/504](http://www.eswr.com/504).

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## Groups seek compromise on Hayward-area project following 9th Cir. injunction

### School, homes could be built — but not golf course

Environmental groups opposed to a development including homes, a golf course and a school near Hayward, Calif., have offered to allow some construction work to go forward.

Earthjustice attorneys, on behalf of the Hayward Area Planning Association and Center for Biological Diversity, have proposed that the parties ask the Ninth Circuit to modify a May 13 injunction that stopped Hayward 1900 Inc. just days before it was to begin grading the site. Plans call for construction of 614 homes on 356 acres.

“We support the housing and school aspects of this project. What remains at issue is whether a badly planned golf course that will destroy unique habitat must remain in this plan,” said Jeff Miller of the Center for Biological Diversity.

An attorney for the developer, an intervenor in the case, said his client was looking at the groups’ offer. Philip Atkins-Pattenson of Sheppard, Mullin, Richter & Hampton also said, “We continue to

believe strongly — as does the government — that we’re right on the merits of the issue and will prevail on appeal.”

The groups have cited objections by Fish and Wildlife Service biologists to the layout of the golf course.

“The proposed sprawling ‘championship’ golf course would destroy and fragment the existing oak woodland, grassland, and coastal scrub ecosystem on Walpert Ridge in the city of Hayward,” the groups said in a news release. “Development on Walpert Ridge could spell doom for the [Alameda] whipsnake and the [California] red-legged frog in the region.”

Greg Loarie, an attorney with Earthjustice, said, “There’s a really easy solution here — just scale back the golf course.”

In a two-page order, Judges Alex Kozinski and Richard Paez granted the appellants’ motion for an injunction pending appeal and put the case on a fast track that would complete briefing by this summer (*Hayward Area Planning Assn. v. Norton*, 04-15737). (See March and April issues for background).

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## Norton, Environmental Defense say it’s time to delist bald eagle

Five years after proposing to delist the bald eagle, the Fish and Wildlife Service may finally be ready to issue a final rule.

Spurred by data collected by Environmental Defense, which show eagle numbers continuing to rise, Interior Secretary Gale Norton said May 12, “We are committed to celebrating the recovery of the bald eagle by removing it from the list of threatened species.”

Craig Manson, Assistant Secretary for Fish and Wildlife and Parks, told the Associated Press a couple of days later that FWS would develop habitat guidelines to protect the raptor after taking public comment.

Environmental Defense recently released a report that details the

eagle’s recovery in the lower 48 states, where it is listed as threatened. The group is convinced that it’s time for the eagle to come off the list.

“There is ample justification for treating this as the success that it is,” said Michael Bean, co-director of Environmental Defense’s Center for Conservation Incentives. It’s especially important to do so now, Bean said, when many critics of the Endangered Species Act like to say the Act is “broken.”

“It seems to me that the eagle is a strong refutation of that,” Bean said, citing the continued increase in numbers and expansion in the bird’s range as proof that the eagle has recovered.

It is found in all of the lower 48 and breeds in 47 of those states, Bean said. About 7,600 pairs are found in the lower 48 states, compared to 417 pairs in 1963, nine years before DDT was banned and 10 before the ESA was enacted.

Since 1998, one year before the proposal to delist the eagle, the population has grown by nearly 2,000 pairs in the coterminous U.S.

The bird will “continue to benefit from two other federal laws and numerous states laws even after it is delisted,” Bean said, referring to the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act.

One reason the final delisting rule has been delayed is that FWS is concerned it won’t be able to adequately protect eagle habitat if ESA protections are lifted. But Bean said BGEPA regulations, which prohibit molesting or disturbing eagles or their nests, “overlap to a significant degree with the ESA’s harm regulation.”

“There is the potential for the service to regulate pretty broadly if it chooses to do so.”

**Web:** Environmental Defense’s report on the eagle, as well as information about the group’s new “Back from the Brink” program, which seeks to put 15 species “on the clear path toward recovery,” is at [www.eswr.com/504](http://www.eswr.com/504).

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## ESUs will be repropoed

(Continued from page 1)

But Lautenbacher said the “proposed relistings” would be completed by the end of the month. NMFS is under a court deadline to make a decision by then on eight Washington state ESUs, but NMFS spokesman Brian Gorman said the service would address 25 of the 26 ESUs.

The service will ask for comments on its proposals and a draft hatchery policy

“The central tenet of the hatchery policy is the conservation of naturally spawning salmon and the ecosystems upon which they depend,” Lautenbacher said. “As our preliminary conclusions indicate, appropriate consideration of hatchery fish does not lead to wholesale delisting of species as some are claiming. Equally erroneous is the suggestion our policy would allow the purposes of ESA to be satisfied by having all the salmon in a hatchery.”

Salmon hatcheries, he said, “have long played an important role in the Northwest, including fulfilling trust and treaty rights of Northwest Indian tribes, and supporting sport and commercial harvest cherished by Northwest citizens. NOAA is encouraged by improvements in hatchery management, and is seeing their increased contribution to speeding the recovery of salmon.”

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# EPA criticizes Forest Service, BLM lynx plans

## Proposals to make conservation standards discretionary won't aid recovery, agency says

Forest Service plans for national forests in the Southern and Northern Rockies “would allow many activities potentially damaging to the lynx and its habitat to occur” and may not help the lynx recover, EPA said in NEPA comment letters it sent to the service recently.

In both cases, EPA criticized draft Environmental Impact Statements prepared by the Forest Service for the Southern Rockies and by FS and BLM for the Northern Rockies for choosing alternatives that would allow land managers to decide whether to implement the standards included in the Lynx Conservation Assessment and Strategy.

Both letters from EPA classified the Forest Service draft EIS's as EC—Environmental Concerns. Both contain similar concerns.

Forest Service Southern Rockies team leader Lois Poppert said the service is continuing to consult with FWS. No decisions have been made yet on whether changes will be made to the plans.

Defenders of Wildlife and other groups and individuals have signalled their intention to sue FWS again over the lynx, this time over its decision to retain the threatened listing. In a 60-day notice, the potential litigants cited many of the same concerns with the land management agencies' plans as EPA.

In its Northern Rockies comment letter, EPA said, “We believe a prudent approach that would err on the side of lynx conservation, would be to retain management direction as Standards until the biologists on the interagency lynx team agreed that adequate research and monitoring information and data was available to support conversion of Standards to Guidelines.”

EPA encouraged “the Forest Service and BLM to consult further with the FWS to develop management direction that ensures effective lynx conservation, and better balances the many resource management and environmental trade-offs.”

The LCAS was developed by the Forest Service, FWS, BLM and the National Park Service to conserve and recover lynx on federal lands. In a July 3, 2003, *Federal Register* notice, FWS concluded the lynx should remain listed as threatened, and “stated that adhering to [a 2000] programmatic biological opinion and the LCAS, in assessing the impacts of federal actions, is expected to be effective in removing most threats to the lynx on federal lands.”

In its letter commenting on the Southern Rockies DEIS, EPA said the service's “Preferred Alternative deviates from the LCAS without providing the scientific data and information to demonstrate that it can lead to the lynx's conservation and recovery in the Southern Rockies. EPA recommends that the Forest Service pursue consultations with [FWS] to resolve our concerns regarding the Preferred Alternative's compliance with the Endangered Species Act.”

The LCAS doesn't just benefit lynx, EPA said. “The [Southern Rockies] DEIS demonstrates that LCAS management direction also enhances habitats and populations of many other

sensitive, listed, and other important fish and wildlife species and accomplishes many other environmental objectives, with potential tradeoffs for extractive industries and motorized recreation.”

EPA found the cumulative effects analysis lacking in both DEIS's. In its Southern Rockies letter, EPA said, “[W]e are concerned about the lack of cumulative impacts analysis and disclosure.... The LCAS addressed cumulative effects of all potential actions that could adversely affect the lynx and other species and resources. The DEIS did not evaluate or disclose the cumulative effects on lynx habitat, populations, and sub-populations for many proposed activities which will negatively affect individual lynx but are stated to not likely affect the population or the recovery of the overall population. If management direction will lead to adverse impacts to individual lynx, it is difficult to understand the Forest Service's conclusion that management direction will lead to lynx restoration and recovery. We propose additional discussion of direct, indirect, and cumulative impacts in the Final EIS regarding the effects on all resources and species that would be affected by alternatives.”

In its Northern Rockies letter, EPA said, “It is not clear if the Forest Service and BLM in proposing changes in some Standards to Guidelines in the preferred alternative fully considered and evaluated cumulative effects on lynx populations and sub-populations when many potentially low-level negative activities occur in combination in many locations across the landscape of the amendment area. Additional discussion regarding cumulative effects analysis should be included in the FEIS.”

EPA also said in both letters that the Forest Service should evaluate the effects of climate change on lynx habitat. “It is our understanding that the majority of scientists believe climate change poses real risks to our environment, although the exact nature and magnitude of these risks remain uncertain.” In its July 3, 2003, remand notice, FWS said climate change is “speculative.”

“The DEIS states that heavy snowfalls are frequent in the northern Rockies, and also acknowledges that weather is among the basic factors that influence vegetation and fire behavior,” EPA's Northern Rockies letter said. “Since lynx are dependent on deep snow habitats, it appears that climate change may pose a potential risk to lynx.”

### Lynx critical habitat to be proposed in 18 months

The Fish and Wildlife Service has agreed to propose critical habitat for Canada lynx by Nov. 1, 2005, and issue a final designation a year later, as part of a settlement of a lawsuit filed in Washington, D.C. (*Defenders of Wildlife v. Norton*, 00-2996 GK, D.D.C.).

The plaintiffs agreed to modify an order issued Dec. 26, 2002, by District Judge Gladys Kessler, by dropping Section 7 “declaratory relief” language. In her 2002 order, Kessler found that FWS had “undermined the purpose and function of the [Section 7] consultation process” by failing to comply with its nondiscretionary duty to designate critical habitat.

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## Lawsuit filed to restore “survey and manage” standard for NW forests

The Forest Service and BLM’s decision to remove management standards for hundreds of rare, but unlisted, species violates NEPA, NFMA, FLPMA, the APA and the ESA, a new lawsuit filed by Northwest environmental groups charges (*Northwest Ecosystem Alliance v. Rey*, 04-844, W.D. Wa.).

A Record of Decision issued by the two agencies in March removed the standard, which requires the agencies to “survey and manage” Late Successional Reserves covered by the Northwest Forest Plan for hundreds of small species, such as mollusks, bryophytes, lichens and fungi.

“The survey and manage standard functioned as an integral part of the overall strategy of the Northwest Forest Plan to meet species stability and distribution objectives in a landscape that was severely degraded by past clearcutting of forests,” the suit says.

The “purpose and need” stated by the agencies in their Final Supplemental EIS is to “provide for healthy ecosystems and a sustainable supply of timber, to the extent these goals are frustrated.”

Says the lawsuit: “The preferred alternative in the FSEIS proposes to remove the survey and manage standard on the bases that it costs too much; that because of it, the agencies cannot log enough to achieve the probable sale quantity; and that it increases the risk of catastrophic fire in the Reserves.”

But those conclusions are not supported by adequate analysis, the suit says.

Nor does the FSEIS “disclose to the public or the decisionmaker an evaluation of the survey and manage standard that includes any of its benefits, including the discovery of new species, the preservation or the viability or persistence of certain species, and the role the standard plays in obviating a need under the ESA to list species.”

The standard was included in the Northwest Forest Plan to

“act as a safety net for species that are not adequately protected by the Reserves and other elements of the [NWFP],” the suit said. In addition, the standard “allows agencies to discover any previously unknown populations of rare and uncommon species which would benefit from this measure.” Lastly, said the lawsuit, “the standard helps provide connectivity between Reserves and for ecological functions such as dispersal of organisms, carryover of species from one forest stand to the next, and the maintenance of ecologically valuable structural components such as down logs, snags, and large trees.”

The original list included over 400 rare species. At the time of the removal of the standard, the list was down to 296.

The Late Successional Reserves cover about 6.8 million acres of forest lands managed by FS or BLM in Washington, Oregon and Northern California. The NWFP covers 24.5 million acres.

In a Biological Opinion released in March, the Fish and Wildlife Service said it could not concur with BLM and FS that removal of the standard would not adversely affect the Northern spotted owl’s critical habitat. But the BiOp concluded that removal of the requirements would not be likely to jeopardize the owl or adversely affect its critical habitat, as any adverse effects would be “minimal.”

But that BiOp “fails to analyze the effects the past and present impacts of all federal, state, private, and other human activities in the action area, the anticipated impacts of all proposed federal projects in the action area that have already undergone formal or early consultation, and the impact of state or private actions that are contemporaneous with the consultation in progress.”

The FSEIS did not analyze the impact of recent demographic studies, including one released by FWS in February, that have shown continued loss of habitat for the Northern spotted owl, the complaint says. The results of the FWS draft report “indicate that there was a loss of owl habitat by 5.14 percent rangewide between 1994 and 2003.” Most of the habitat loss on federal lands occurred in Oregon and the California Cascades, the FWS report said.

Under its NEPA claims, the plaintiffs allege that the agencies have not examined the cumulative impacts of the removal of the standard or changes to the Aquatic Conservation Strategy.

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## Spotted owl numbers dropped from 1990-2003, study says

Northern spotted owl populations declined by 4.1 percent annually from 1990 to 2003, according to an analysis performed by government scientists that will be used as part of a listing status review by the Fish and Wildlife Service.

The status review, required as part of a settlement with timber companies in the Northwest, is due to be completed in November 2004.

The biggest declines occurred in Washington, where NSO populations dropped by 7.5 percent per year. In Oregon, the number of owls dropped by 2.8 percent, and in California, by 2.2 percent.

Reproductive and survival rates were relatively stable, the analysis said. But the additions of new young were not enough to offset the loss of owls “due to various mortality factors.”

The report was done by the Northwest Forest Plan (NWFP)

Interagency Regional Monitoring Program, which is required to conduct a 10-year review of the 1994 plan. The 10-year evaluation is due January 2005.

In a question-and-answer document, the researchers said, “we did not expect the magnitude of the declines in Washington.” But they also said, “As additional acres of forest mature over time, we expect habitat conditions to improve, and demographic rates should improve as well.”

The report said “it is uncertain what role the barred owl has played in the demography of northern spotted owls. We found no detectable effect of barred owls on fecundity of spotted owls and only two study areas where there was an indication of effects on survival rates.”

*(Continued on next page)*

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## FS should consider limiting grazing on Bridger-Teton NF: EPA

The Forest Service should consider a temporary halt to grazing on allotments in the Bridger-Teton National Forest because of environmental damage, EPA said in comments on a draft EIS.

"[W]e have serious concerns about deficiencies in the DEIS, the limited range of alternatives to the Proposed Action, and the amount of adverse impacts to aquatic and terrestrial resources that will continue under the Proposed Action," said Larry Svoboda, Director of the NEPA Program in EPA's Denver regional office.

The Forest Service has proposed to allow grazing to continue, albeit somewhat less intensely, on six allotments covering 169,000 acres in the forest's Pinedale Ranger District. But EPA said that while grazing does not have to be discontinued entirely, the service should consider scaling it back considerably in order to protect natural resources.

"We are concerned that the Forest Service did not evaluate options to consider: (a) reducing the number of livestock or changing operations, (b) discontinuing grazing in some allotments or parts of allotments where adverse environmental impacts are greatest, nor (c) implementing more protective grazing practices and conditions and land management improvements," Svoboda said.

"Our review found that the evaluation of water quality and aquatic resources lacks information on numerical and narrative water quality standards and the DEIS does not indicate whether streams meet those standards," Svoboda said. "We are concerned that the DEIS has not identified and fully evaluated a reasonable range of alternatives to enhance and protect water quality and aquatic species that are rare and sensitive and/or are listed under the federal Endangered Species Act."

Those species include Colorado River cutthroat trout, which FWS recently determined do not warrant protection as either threatened or endangered. Other listed species that could be adversely affected by the grazing include gray wolves, grizzly bears and Canada lynx.

Sensitive species, as classified under the National Forest Management Act, include Snake River fine spotted cutthroat trout, spotted frog, wolverine, northern goshawk, great gray owl, peregrine falcon, three-toed woodpecker, and "numerous species of sensitive plants," EPA said.

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The report noted that other recent studies "that used site-specific data on barred owls ... have shown that barred owls are displacing spotted owls." More research using site-specific data needs to be done, the researchers said.

The data represent preliminary results from a workshop held in January 2004.

FWS has hired a contractor, Sustainable Ecosystems Institute, to provide a report by July. The preliminary report has not been peer-reviewed, but will be peer-reviewed before the service's evaluation is finished in November.

"Please consider stream closures for livestock and other active management practices that will further compliance with water quality standards and better protect endangered and sensitive trout species in impaired and threatened allotment streams," EPA recommended. "We understand that to be in compliance with the Forest Plan water quality standard and the Wyoming Department of Environmental Quality's settle-able solids standard, Forest streams should have less than 20 percent fines in trout spawning gravels to support cold-water fisheries. Numerous streams and segments of streams exceed that standard, including reaches of Tepee Creek and Tosi Creek in the Noble Pastures and Upper Green River Allotments, where the remnant population of Colorado River Cutthroat Trout is isolated and 'are considered to be at high risk of extinction based upon the small population size, isolation in a small headwater stream, the presence of nonnative trout populations, and degraded habitat conditions'. Similarly, it appears that the Finespotted Snake River Cutthroat population South Fork Fish Creek, 'identified as depressed', is surviving in severely degraded conditions based on the bank stability and bank disturbance that are reported in the DEIS."

The agency also asked the Forest Service to "please consider a more comprehensive assessment, and propose protection strategies in the Final EIS to manage Colorado River cutthroat trout and other cold-water fish species." It said the DEIS did not report monitoring data for sensitive streams that are managed for Colorado River Cutthroat, such as Miner Creek and Rock Creek in the Beaver-Twin Allotment.

## Judge gives NMFS more time to complete BiOp — maybe

U.S. District Judge James Redden has given NMFS an additional six months to complete a Biological Opinion on the Federal Columbia River Power System (FCRPS) (*National Wildlife Federation v. NMFS*, 01-640-RE, D. Or.).

But the judge said he was granting NMFS' motion "subject to modification." He ordered the parties to discuss at a June 4 meeting the ramifications of the service's ongoing status reviews of salmonids.

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## NSO is separate subspecies: USGS Mexican, California owls have similar makeup

The Northern spotted owl is a separate subspecies from California and Mexican spotted owls, a new U.S. Geological Survey has confirmed.

"The study also confirms a zone of mixing between northern and California spotted owls in the Klamath region of southern Oregon, indicating a more northerly presence of California spotted owls than previously thought," USGS said.

The same study "also found no significant genetic differences between Mexican and California spotted owls," USGS said.

"Researchers found no evidence, however, for the presence of northern spotted owls in the traditional range of the California spotted owl," USGS said.

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# Open space bond OK'd in Pima to support Sonoran plan

In a big victory for the Sonoran Desert Conservation Plan, voters in Pima County, Ariz., overwhelmingly approved a \$174 million bond proposal to buy or otherwise preserve thousands of acres of desert land surrounding the city of Tucson.

Nearly two-thirds of those at the polls approved the open space bond May 18, after it drew endorsements from an unlikely coalition of environmentalists, developers, realtors, government officials, the National Rifle Association and University of Arizona basketball coach Lute Olson.

It passed as part of a package of \$732 million in six bond proposals for new parks, hospital and court buildings, a regional police radio communications system and the local sewer system.

The victory represents a political turnaround for the conservation plan, which drew fierce opposition when county officials introduced it in early 2001 but has since snowballed in popularity. It comes as the county seeks approval from the Fish and Wildlife Service of its habitat conservation plan to preserve land for 55 vulnerable species.

It's not clear how much land the new open space bond will buy because local land prices are rapidly escalating. Some supporters say it could net 50,000 to nearly 100,000 acres. That would represent a down payment on the habitat conservation plan that would preserve up to 440,000 acres over 50 years.

Supporters say the bond passage reflects a voter mandate to preserve land as the county's population grows at least 20,000 per year. Opponents said the approval shows the power of money: more than \$500,000 in campaign expenditures for pro-bond forces compared to a few thousand spent by the opposition.

"We hit the wall," said County Board of Supervisors Chairwoman Sharon Bronson, in explaining voter approval of the bonds. "As we're growing, our quality of life has been deteriorating . . . A lot of people thought we were approaching the point where we couldn't sustain our economic development efforts."

The rifle association sent its 11,000 Pima County members a May 10 alert, urging support of the open space bond and a companion parks bond spending \$3.5 million on a new shooting range. Olson spoke on radio advertisements extolling the entire bond package.

"We have some of the best quail hunting in the country – three species of quail," said Todd Rathner, a Tucson resident who is one of 76 national NRA board members. "We've got terrific white tail deer hunting and decent mule deer hunting. Places where I used to take my kids hunting, you can't go there anymore . . . the gates are locked now."

Supporters had "big shots" behind them, including some of the community's leading developers, said a bond opponent. Opponents said that big landowners would reap higher land values from protection of open space parcels near their properties, or from sales of their land.

"The poor people don't have a chance. If you have someone with a million dollars he's going to win the campaign as opposed to someone with \$10 in his pocket," said Ike Eychner, treasurer of a committee that opposed the bond on the grounds that nearly 87 percent of the county's land is already government or Indian-owned.

But the committee that backed the open space bond was financed largely by individuals, not special interests. The vast majority of contributions to Friends of the Sonoran Desert were \$100 or less, adding up to nearly \$400,000, said Susan Shobe, the group's director. Developers gave \$82,000 of \$114,000 raised by a second committee supporting all six bond proposals.

"We had the big shots and the little shots," Shobe said.

County Administrator Chuck Huckelberry, who helped hatch the conservation plan idea in the late 1990s, won the neutrality of the plan's leading critic in the bond election – the Southern Arizona Homebuilders Association. The association's board had been prepared to spend money opposing the bond until Huckelberry met with it and answered many of the group's concerns.

In a Feb. 24 letter to association president Edward Taczanowsky, Huckelberry said a successful conservation plan would lead to issuance of a federal Section 10 permit meaning that individual homebuilders would not be completely responsible for complying with the Endangered Species Act.

Future listings of threatened or endangered species won't affect growth beyond what's prescribed in the conservation plan, Huckelberry wrote: "Hence, your members are protected to the maximum extent possible . . ."

Huckelberry also wrote that the county wishes to assemble much of the plan's biological reserve as a "working landscape," preserving ranching instead of creating a public park. He indicated that the plan may not end up requiring conservation of 440,000 acres, because high-value land protecting more species will get more credit to offset mitigation requirements than lower value land. Finally, he told the homebuilders that he sees no need to propose additional land-use regulations to carry out the conservation plan – an idea that many environmental activists in the community have pushed for.

Environmentalists, meanwhile, were privately divided during the campaign over a bond that they publicly endorsed. The main reason is that to gain maximum support from various neighborhood groups and other local government agencies, the county government allocated \$62 million, or more than one-third of the \$174 million bond, to purchases of land not among those that biologists have called the most important to ensure conservation of the 55 vulnerable species.

Some environmentalists were privately dismayed at the large amounts of money allocated to non-priority lands, although Huckelberry said even those lands would ultimately be credited to the HCP by FWS. The symbol of this division was a proposal to pay \$12 million to buy the 600-acre Sweetwater Preserve parcel in the Tucson Mountains west of the city that is rich with saguaro cacti and washes, but otherwise did not merit as high a ranking from scientists as other lands.

Huckelberry said that this parcel would be perhaps the first land purchased by the bond money, because its owner otherwise could develop it very quickly. But Jenny Neeley, southwest associate for Defenders of Wildlife, said before the election that her group believes its purchase could undermine the larger conservation plan.

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# FWS panther data challenged by service's biologist

## 17-year service veteran files data quality challenge

A Fish and Wildlife Service biologist in the Vero Beach office has petitioned his own agency to correct the record on the Florida panther.

Andy Eller, who has been with FWS for 17 years, joined with Public Employees for Environmental Responsibility (PEER) to file an Information Quality Act (aka Data Quality Act) petition with the service on May 4.

Eller and PEER say FWS has continued to use data based on research done by University of Kentucky biologist David Maehr, which relies on panthers' daytime habits. But ignoring what panthers do at night necessarily excludes significant portions of habitat, leaving it vulnerable to development. A Scientific Review Team contracted by the state and FWS recently came to similar conclusions, and Maehr himself told *ESWR* that the habitat model developed with his data should be thrown out (*ESWR* Jan, p. 16).

FWS is currently circulating a Conservation Strategy "that fails to incorporate a meaningful definition of habitat that encompasses the life-cycle requirements of the panther, in effect defaulting to Maehr's narrow and inaccurate definition," the petition says.

"Daytime cover, often associated with forest patches, is neces-

sary but not sufficient to support the panther," says the petition. "A wide range of habitats are used during times of peak activity."

The same criticisms have been voiced by three of the four panther experts on the Panther Subteam of MERIT (Multi-species/Ecosystem Recovery Implementation Team), which was convened by FWS to design a science-based habitat conservation strategy. Maehr is the other panther expert.

Subteam member Jane Comiskey of the Institute for Environmental Modeling at the University of Tennessee says FWS's draft strategy "contains contradictory material from independent scientists and consultants on the Subteam. The draft also contains material added by the service after our last meeting without consulting the Subteam and does not include the definition of habitat we agreed to include at our last meeting." Comiskey believes the service should not be representing the strategy as a Subteam document.

Almost two years since the Subteam's last meeting, FWS "has still not released the Conservation Strategy for public comment, and the Subteam has still not been allowed to incorporate peer-review comments related to habitat, available since November 2002 and February 2003," Comiskey said.

FWS says it is planning to ask for public comment soon on a habitat conservation tool to help land-use planners and developers determine mitigation for panther habitat loss. At the same time, the service will seek comments on the Conservation Strategy.

"There were people who thought we were going to release this," said FWS spokesman Bert Byers. "It was our opinion that we wanted to take some of the best from the strategy and incorporate it in the tool and release both simultaneously."

That way, said Byers, anyone who wants to comment on the documents can do so. Asked why it's taken so long, Byers said, "We want to make sure that we've got this right."

But Comiskey says "there is no justification for circulating known misinformation about panthers in the Draft Conservation Strategy, when peer-review comments have long been available that could put the Strategy on a sound footing."

Asked why he filed the petition, Eller said, "Resolution of this debate is the key to countering habitat evaluation methods used in section 7 consultations that ignore non-forested habitats, reduce the value of forested habitats that do not fit an arbitrarily defined ideal, and that stress habitat quality over habitat quantity."

Eller said the agency has "dodge[d] the issue of establishing a jeopardy threshold for 10 years and deliberately manipulate[d] data and information these past four years to paint an overly optimistic picture of the panther's situation."

He also said he has not been allowed to work on panther issues since early 2003, when he tried to convince a supervisor to support a jeopardy conclusion for a Biological Opinion on the Mirasol development in southern Lee County. Eller says he was threatened with a poor performance review if he wrote a jeopardy opinion, and was subsequently removed from the project.

"Ultimately, the decision to file the petition rested on whether or not I could stand by mute and watch politics trump science while development gnawed away at the remaining panther habitat," Eller said.

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## Bush (in Fla.) mulls manatee bill

Florida Gov. Jeb Bush is under pressure from environmentalists to veto legislation that would require the state to study whether to increase boat speeds in Florida.

The bills cleared the state House and Senate and are awaiting Bush's signature, or veto. The state's Department of Environmental Protection has not decided what recommendation to make to Bush.

The bill would require the Fish and Wildlife Conservation Commission to conduct a "signage and boat speed assessment" that would include "an evaluation of higher speed travel corridors in manatee zones to determine the most effective speed to balance safe boating, recreational use, vessel operating characteristics, and manatee protection." In addition, by July 1, 2005, "the commission shall develop rules to define how measurable biological goals will be used by the commission when evaluating the need for additional manatee protection rules."

The commission also would have to conduct a study that "shall be used by the commission in its mission to provide manatees with the maximum protection possible, while also allowing maximum recreational use of the state's waterways."

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"It's a pretty piece of land, but biologically speaking not anywhere near the list of top priorities," said Neeley.

But Debbie Hecht, president of the Tucson Mountains Association, said that much of the biological core areas contained in the plan, which have habitat for at least five vulnerable species, aren't facing immediate development pressures. —*Tony Davis*

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## Judge keeps pesticide no-spray zones for salmon streams in Northwest

A federal judge has left in place an order that prohibits the spraying of certain pesticides near salmon-bearing streams in the Pacific Northwest.

Chief U.S. District Judge John C. Coughenour denied a request by pesticide manufacturers and farming groups to suspend the restrictions pending appeal to the Ninth Circuit (*Washington Toxics Coalition v. Environmental Protection Agency*, 01-132C, W.D. Wa.).

The judge said the intervenors' evidence of economic harm was irrelevant. He also said the groups should direct their concerns to EPA. "[I]f EPA had expended as much effort in compliance with the ESA as it has expended in resisting this action, the lawsuit might have been unnecessary," Coughenour said.

In July 2002, Coughenour ordered EPA to consult with the National Marine Fisheries Service on the effects of more than 50 pesticide active ingredients on salmon.

Regarding the growers' and manufacturers' concern that the restrictions are unclear, the judge said, "the Court again emphasizes that because the January 22, 2004 order enjoined EPA from authorizing the unrestricted application of certain pesticide active ingredients, it is EPA's duty to provide individual pesticide users with comprehensive instructions as to the Order's scope."

The Washington State Farm Bureau argued that the judge "failed to properly consider the harm that buffers will cause farmers and ranchers or the ripple effect they will have on the state's rural communities and agricultural economy," WSFB said in a March 17 news release.

The pesticide and farm groups will continue their appeal in the Ninth Circuit, which earlier in May declined to issue a stay of Coughenour's order. Briefing will begin in June.

## Murrelets declining, says report prepared for FWS status review

A report by a consulting firm hired by the Fish and Wildlife Service has concluded that marbled murrelet populations in Washington, Oregon and California have continued to decline.

FWS will consider the report in completing its five-year status review of the murrelet.

"The good news is that several threats, including the annual rate of habitat loss, loss of occupied sites due to survey error, and mortality from gill-net fishing, appear to have been reduced since the species was listed in 1992," the report, prepared by EDAW Inc., said. "These improvements will help to slow the rate of decline and lengthen the time to extinction."

Population declines "are related mainly to historic and ongoing nesting habitat loss and low breeding success (due to high predation related to reduce quality of remaining nesting habitats)," the report said.

Most birds "are left with small, isolated stands of older trees for nesting," and are just struggling to remain viable. Birds in Mendocino County, and Santa Cruz and San Mateo counties "face potential extinction in the next century."

## Judge gives go-ahead to Bayport terminal in CWA, NEPA case

The Port of Houston can proceed with construction of the Bayport Container and Cruise Terminal, which will result in destruction of 146 acres of wetlands, a federal judge ruled May 5 (*City of Shoreacres v. Waterworth*, H-03-2443, S.D. Tex.).

Only 19.7 acres of that total were deemed jurisdictional by the Corps. The Corps concluded that 126.7 acres on the site are hydrologically isolated, and U.S. District Judge Vanessa Gilmore deferred to the Corps' decision.

The judge also agreed with the Corps and other federal agencies, including FWS and EPA, that the Port's mitigation plan would be adequate even if all 146 acres were jurisdictional.

"The mitigation efforts include wetlands creation, wetlands enhancement, prairie enhancement, and uplands preservation at the 174-acre Memorial Tract adjacent to Armand Bayou, preservation of the 456-acre Banana Bend Tract on the San Jacinto River, and preservation of 500 acres of coastal prairie within the Cypress Creek watershed," Gilmore said.

The judge rejected the plaintiffs' argument that the Corps did not properly consider "overland sheet flow" — rainfall that flows over land — in determining whether the wetlands were jurisdictional.

In a footnote, Gilmore gave the nod to two Fifth Circuit decisions, *Rice v. Harken* and *In re: Needham*, in concluding that the Clean Water Act "does not extend to waters that are neither navigable waters nor truly adjacent to navigable waters."

"In the Fifth Circuit, controlling authority holds that the CWA does not cover waters that are isolated or separated from a navigable body of water, such as these."

Gilmore also found that the Corps does not have to examine an alternative as practicable if it is "unavailable." The plaintiffs said two other locations, Shoal Point and Pelican Island, should have been looked at as alternatives.

In the end, the judge called the plaintiffs' claims "a blunderbuss salvo of quibbles."

## Sparrow critical habitat decision stands

The D.C. Circuit Court of Appeals has granted the Fish and Wildlife Service's motion to voluntarily dismiss an appeal involving critical habitat revision for the Cape Sable seaside sparrow.

The court's decision leaves in place an opinion by U.S. District Judge Rosemary Collyer that found the ESA gives FWS discretion "as to revising a critical habitat designation, but that the [Administrative Procedure Act] requires reasonable timeliness once an obligation to undertake a revision attaches" (*Biodiversity Legal Foundation v. Norton*, 285 F. Supp. 2d 1, (2003)).

Collyer found that the clock began to tick on the service's duty to revise CH when it stated in a 1999 recovery plan that the sparrow designation "requires significant review and redesignation."

Plaintiffs' attorney Eric Glitzenstein said that to his knowledge, Collyer's Sept. 30, 2003, opinion "is the first time a court has found that a Recovery Plan creates an enforceable legal duty."

Meanwhile, Collyer has ordered FWS to start work on the proposed revision by Oct. 1, 2005, and complete it by Oct. 24, 2007.