

- **Board of Directors**  
**Communications and Legislation Committee**

September 13, 2005 Board Meeting

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**9-2**

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**Subject**

Report on federal Endangered Species Act legislation and review of board-adopted policy principles

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**Description**

Endangered Species Act (ESA) reform is again a major topic of discussion in Washington, D.C. Metropolitan, through its participation in the Western Urban Water Coalition (WUWC), is closely monitoring legislation that proposes ESA modification and has had input into the process through that organization. Chief among WUWC's goals has been to codify existing regulatory incentives to non-federal landowners including no surprises, safe harbor agreements, pre-listing agreements, candidate conservation agreements, and multi-species Habitat Conservation Plans (HCPs), and to seek revision of the Act to provide that areas subject to such agreements not be included in areas designated as critical habitat. Two bills have been introduced this session making minor amendments to the Act and additional legislation is expected before the end of the year.

H.R. 1299 (Cardoza) ([Attachment 1](#)) is designated the "Critical Habitat Enhancement Act of 2005." The bill proposes moving the designation of critical habitat to a date no later than one year after the final approval of a recovery plan for the species or three years after the date of publication of the final regulation implementing a determination that the species is endangered or threatened, whichever occurs first. H.R. 1299 would exclude from critical habitat designation those areas where actions are authorized under Section 10(a) permits and would further define the economic impacts that would have to be considered under the Act. The bill has been referred to the House Committee on Resources and executive comment has been requested from the Department of the Interior.

H.R. 1837 (Flake) ([Attachment 2](#)) would address some of the issues faced by the city of Phoenix at its Horseshoe Reservoir by amending the ESA to prohibit the Secretary from designating critical habitat within the high water mark of a water storage reservoir if habitat is periodically created and destroyed as a result of fluctuations in water levels caused by its operation. The bill would also require the Secretary to consider the offsetting effects of habitat conservation measures proposed for implementation. H.R. 1837 has also been referred to the House Committee on Resources and comment from Interior has been sought.

In addition, it is anticipated that House Resources Committee Chairman Richard Pombo will soon introduce legislation that will propose major revisions to the Act. Given the increased level of ESA discussion in Washington, it appears a good time for the Board to review the ESA policy principles last revised in 1997 ([Attachment 3](#)). While some of the principles concerning a moderate approach to ESA reform and support for statutes recognizing binding ESA compliance agreements still appear to be good policy, others, such as support for provisions that would give state law primacy over the federal ESA, appear dated. Based on ESA issues that have affected, or had the potential to impact, Metropolitan since 1997, staff has developed a revised set of policy principles for the Board to consider ([Attachment 4](#)). The proposed principles seek support for ESA-related legislative, administrative, or judicial activities that:

- Continue to support a moderate approach to amending the federal ESA that improves its workability and ability to meet goals.
- Continue to support mechanisms that protect threatened and endangered species and their habitat, and their ultimate recovery.

- Encourage development of regulations to provide consistent procedures to guide federal agency decision-making, particularly with respect to critical habitat designations and related economic analyses.
- Codify or otherwise strengthen regulatory incentives to non-federal landowners such as no surprises, safe harbor agreements, pre-listing agreements, candidate conservation agreements, and multi-species HCPs.
- Encourage the provision of adequate funding for federal agencies to meet their obligations under cooperative recovery plans and making such agreements enforceable against all parties.
- Revise the critical habitat designation process in a manner consistent with the principles in [Attachment 4](#).
- Clarify and resolve issues relating to recent judicial interpretations of the ESA.
- Clarify the scope of indirect effects analyses required for federal ESA permits.

Based on board discussion and input staff will, if necessary, revise the proposed policy principles and bring them back for final consideration at the Board's October meeting.

## Policy

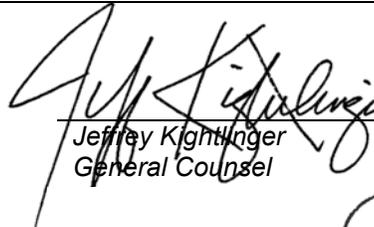
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Board-adopted Federal Endangered Species Act Policy (last amended February 11, 1997)

## Fiscal Impact

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None

  
 Jeffrey Kightlinger  
 General Counsel

8/30/2005  
 Date

  
 Dennis B. Underwood  
 CEO/General Manager

8/31/2005  
 Date

[Attachment 1 – H.R. 1299](#)

[Attachment 2 – H.R. 1837](#)

[Attachment 3 – ESA Policy Principles](#)

[Attachment 4 – Proposed Revised Policy](#)

BLA #3878

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109TH CONGRESS  
1ST SESSION

# H. R. 1299

To amend the Endangered Species Act of 1973 to reform the process for designating critical habitat under that Act.

IN THE HOUSE OF REPRESENTATIVES

MARCH 15, 2005

Mr. CARDOZA (for himself, Mr. DOOLITTLE, Mr. JONES of North Carolina, Mr. BACA, Mr. HERGER, Mr. RADANOVICH, Mr. COSTA, Mr. OTTER, Mr. CALVERT, Mr. PETERSON of Pennsylvania, Mr. WALDEN of Oregon, Mr. SIMPSON, Mr. OSBORNE, Mr. REHBERG, Mr. NUNES, Ms. BORDALLO, and Mr. GARY G. MILLER of California) introduced the following bill; which was referred to the Committee on Resources

## A BILL

To amend the Endangered Species Act of 1973 to reform the process for designating critical habitat under that Act.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### SECTION 1. SHORT TITLE.

This Act may be cited as the “Critical Habitat Enhancement Act of 2005”.

### SEC. 2. DESIGNATION OF CRITICAL HABITAT; STANDARD.

(a) **IN GENERAL.**—Section 4(a) of the Endangered Species Act of 1973 (16 U.S.C. 1533(a)) is amended—

(1) by redesignating subparagraph (B) of paragraph (3) as paragraph (4);

(2) in paragraph (4) (as so redesignated)—

(A) by striking “(i)” and inserting “(A)”;

(B) by striking “(ii)” and inserting “(B)”;

(C) by striking “(iii)” and inserting “(C)”;

(3) by amending paragraph (3) to read as follows:

“(3) (A) (i) The Secretary shall, by regulation promulgated in accordance with subsection (b) and to the maximum extent practicable, prudent, and determinable, issue a final regulation designating any habitat of the species determined to be an endangered species or threatened species that is critical habitat of the species.

“(ii) The Secretary shall make any designation required under clause (i) by not later than one year after the final approval of a recovery plan for the species under section 4(f), or 3 years after the date of publication of the final regulation implementing a determination that the species is an endangered species or threatened species, whichever is earlier.

“(B) The Secretary shall reconsider any determination that designation of critical habitat of a species is not practicable, or determinable, during the next review under section 4(c)(2)(A) or at the time of a final approval of a recovery plan for the species under section 4(f).

“(C) The Secretary may, from time-to-time as appropriate, revise any designation of critical habitat under this paragraph.

“(D) Notwithstanding subparagraphs (A), (B), and (C), any designation of an area as critical habitat shall not apply with respect to any action authorized by—

“(i) a permit under section 10(a) (including any conservation plan or agreement under that section for such a permit) that applies to the area;

“(ii) a written statement under section 7(b)(4); or

“(iii) a land conservation or species management program of a State, a Federal agency, a federally recognized Indian tribe located within the contiguous 48 States, or the Metlakatla Indian Community that the Secretary determines provides protection for habitat of the species that is substantially equivalent to the protection that would be

provided by such designation.

“(E) Nothing in this paragraph shall be construed to authorize a recovery plan to establish regulatory requirements or otherwise to have an effect other than as non-binding guidance.”

(b) **CONFORMING AMENDMENT.**—Section 4(b)(6)(C) of the Endangered Species Act of 1973 (16 U.S.C. 1533(b)(6)(C)) is repealed.

### **SEC. 3. BASIS FOR DETERMINATION.**

Section 4(b)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1533(b)(2)) is amended—

(1) by inserting “(A)” after “(2)”; and

(2) by adding at the end the following:

“(B) In determining whether an area is critical habitat, the Secretary shall seek and, if available, consider information from State and local governments in the vicinity of the area, including local resource data and maps.

“(C) Consideration of economic impact under this paragraph shall include—

“(i) direct, indirect, and cumulative economic costs and benefits, including consideration of changes in revenues received by landowners, the Federal Government, and State and local governments; and

“(ii) costs associated with the preparation of reports, surveys, and analyses required to be undertaken, as a consequence of a proposed designation of critical habitat, by landowners seeking to obtain permits or approvals required under Federal, State, or local law.

“(D) In designating critical habitat of a species, the Secretary shall first consider all areas that are known to be within the geographical area determined by field survey data to be occupied by the species.”

### **SEC. 4. CONTENT OF NOTICES OF PROPOSED DESIGNATION OF CRITICAL HABITAT.**

Section 4(b)(5)(A) of the Endangered Species Act of 1973 (16 U.S.C. 1533(b)(5)(A)) is amended—

(1) in clause (i) by striking “, and” and inserting a semicolon;

(2) in clause (ii)—

(A) by striking “and to each” and inserting “to each”; and

(B) by inserting “, and to the county and any municipality having administrative jurisdiction over the area” after “to occur”; and

(3) by adding at the end the following:

“(iii) with respect to a regulation to designate or revise a designation of critical habitat—

“(I) publish maps and coordinates that describe, in detail, the specific areas that meet the definition under section 3 of, and are designated under section 4(a) as, critical habitat, and all field survey data upon which such designation is based; and

“(II) maintain such maps, coordinates, and data on a publicly accessible Internet page of the Department; and

“(iv) include in each of the notices required under this subparagraph a reference to the Internet page referred to in clause (iii)(II);”.

**SEC. 5. CLARIFICATION OF DEFINITION OF CRITICAL HABITAT.**

Section 3(5) of the Endangered Species Act of 1973 (16 U.S.C. 1532 (5)) is amended—

(1) in subparagraph (A) by striking clauses (i) and (ii) and inserting the following:

“(i) the specific areas—

“(I) that are within the geographical area determined by field survey data to be occupied by the species at the time the areas are designated as critical habitat in accordance with section 4; and

“(II) on which are found those physical and biological features that are necessary to avoid jeopardizing the continued existence of the species and may require special management

considerations or protection; and

“(ii) areas that are not within the geographical area referred to in clause (i)(I) and that the Secretary determines are essential for the survival of the species at the time the areas are designated as critical habitat in accordance with section 4.”;

(2) by striking subparagraph (B) and redesignating subparagraph (C) as subparagraph (B); and

(3) by adding at the end the following:

“(C) For purposes of subparagraph (A)(i) the term ‘geographical area determined by field survey data to be occupied by the species’ means the specific area that, at the time the area is designated as critical habitat in accordance with section 4, is being used by the species for breeding, feeding, sheltering, or another essential behavioral pattern.”.

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Current legislative activities at the House of Representatives.

109TH CONGRESS  
1ST SESSION

# H. R. 1837

To amend the Endangered Species Act of 1973 to establish limitations on the designation of critical habitat, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 26, 2005

Mr. FLAKE (for himself, Mr. HAYWORTH, Mr. RENZI, Mr. SHADEGG, and Mr. FRANKS of Arizona) introduced the following bill; which was referred to the Committee on Resources

## A BILL

To amend the Endangered Species Act of 1973 to establish limitations on the designation of critical habitat, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### **SECTION 1. LIMITATION ON DESIGNATION OF CRITICAL HABITAT.**

Section 4(b)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1533(b)(2)) is amended by adding at the end the following: "The Secretary shall not designate as critical habitat any habitat located within the high water mark of a water storage reservoir, water diversion structure, canal, or other artificial water delivery facility, if such habitat is periodically created and destroyed as a result of fluctuations in water levels caused by operation of the water storage reservoir, water diversion structure, canal, or other artificial water delivery facility."

### **SEC. 2. CONSIDERATIONS IN DETERMINING LIKELIHOOD OF DESTRUCTION OR ADVERSE MODIFICATION OF THE CRITICAL**

**HABITAT.**

Section 7(b)(3) of the Endangered Species Act of 1973 (16 U.S.C. 1536(b)(3)) is amended by adding at the end the following:

“(C) In determining whether a Federal agency action is likely to result in the destruction or adverse modification of the critical habitat of a species, the Secretary shall consider the offsetting effects of habitat conservation measures proposed to be implemented as part of the action, including the protection and management of alternative habitat, whether or not designated as critical habitat, that has or is likely to develop the primary constituent elements of critical habitat.”.

**SEC. 3. AMENDMENTS RELATING TO INCIDENTAL TAKE PERMITS.**

Section 10(a) of the Endangered Species Act of 1973 (16 U.S.C. 1539 (a)) is amended by adding at the end of paragraph (2) the following:

“(D) The requirements of paragraph (2)(B)(ii) shall be deemed satisfied if the Secretary finds that the minimization and mitigation measures proposed to be implemented are rationally related to the level of take under the plan.”.

**SEC. 4. EXEMPTION FROM LIABILITY FOR TAKE OF LISTED AQUATIC SPECIES.**

Section 10 of the Endangered Species Act of 1973 (16 U.S.C. 1539) is amended by adding at the end the following:

“(k) **EXEMPTION FROM LIABILITY FOR TAKE OF LISTED AQUATIC SPECIES.**—The operator of a water storage reservoir, water diversion structure, canal, or other artificial water delivery facility shall not be in violation of section 9(a) by reason of any take of any aquatic species listed under section 4(c) that results from predation, competition, or other adverse effects attributable to non-native aquatic species introduced by another person into the river basin in which the water storage reservoir, water diversion structure, canal, or other artificial water delivery facility is located.”.

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## **FEDERAL ENDANGERED SPECIES ACT**

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**Issue:** Federal Endangered Species Act.

**Policy Adopted:** Update Metropolitan's federal ESA policy principles and support legislative activities as follows:

- **Voluntary Natural Systems Management:** Proactively pursue inclusion of a voluntary natural systems management approach as an alternate track to single species protection.
- **Pre-listing:** Continue to support binding pre-listing agreements that are subject only to review for adherence to terms at the time of any subsequent species listing.
- **Mitigation Banking:** Support provisions for appropriate mitigation banking where it promotes conservation of natural systems.
- **State Role:** Support provisions that would allow states greater leeway in the implementation of the federal ESA.
- **State Water Law:** Continue to support provisions that specify that decisions of a state regulatory body pursuant to State water law would prevail over requirements of the federal ESA.
- **Moderate Approach:** Continue to support a moderate approach to amending the federal ESA that improves its workability and ability to meet goals.
- **"No Surprises:"** Continue to support statutory authorization for binding ESA compliance agreements and permits that:
  - ◆ include a defined range of adaptive management measures to provide flexibility as appropriate to refine conservation commitments and to address unforeseen circumstances over the life of the permit; and
  - ◆ provide that any modifications to the conservation plan necessary to address future unforeseen or extraordinary circumstances will not impose additional costs (dollars, land or water) on the permittee without the consent of that permittee.

M.I. 41327 - March 14, 1995; additional "no surprises" principle added by M.I. 42287 - February 11, 1997.

Federal Endangered Species Act.

**Proposed Revised Policy:**

Update Metropolitan's policy principles on amendments to the federal ESA to read as follows:

- Continue to support mechanisms that protect threatened and endangered species, their habitat, and foster their ultimate recovery.
- Encourage the promulgation of regulations that provide uniform procedures to guide federal agency decision, especially listing decisions and critical habitat designations..
- Codify, or otherwise strengthen, regulatory incentives to non-federal landowners such as no surprises, safe harbor agreements, pre-listing agreements, candidate conservation agreements, and multi-species HCPs.
- Secure legislative or administrative changes in the Critical Habitat Designation process that:
  1. Ensure decision-makers have the best available scientific information on which to base their rulemaking.
  2. Require the promulgation of regulations that specify the methodology to be used to evaluate the direct and indirect economic impacts that would result from the critical habitat designation of a specific area, based upon cost-effectiveness principles.
  3. Exclude from critical habitat designations areas subject to conservation management tools, such as HCPs, safe harbor agreements, candidate conservation agreements, and state and local agency land use or water management plans, that include significant species conservation measures for the subject species.
  4. Clarify or otherwise resolve issues related to recent judicial interpretations of "adverse modification."
- Provide adequate funding for federal agencies to meet their own obligations under cooperative recovery plans and similar initiatives. Such agreements should be fully enforceable against all parties, and any necessary waivers of sovereign immunity should be provided for. If federal agencies fail to perform, other participants in such efforts should not be required to expand their own obligations to make up for the federal failure to perform.
- Clarify that the scope of indirect effects analyses required for federal ESA permits is limited to those effects that are within the legal authority of the permit applicant to control, would primarily be caused by the implementation of the proposed activity, are reasonably certain to occur, and for which specific effects on threatened or endangered species or designated critical habitat can be identified.

Continue to support a moderate approach in seeking changes to the federal ESA through participation in legislative, administrative, and judicial processes to improve its workability and ability to meet its objectives.