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**BEFORE THE  
SUBCOMMITTEE ON FISHERIES, WILDLIFE, AND WATER  
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS**

**UNITED STATES SENATE**

**MAY 19, 2005**

Mr. Chairman and members of the Committee, I am James H. Lecky, Senior Advisor for Intergovernmental Programs for the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NMFS). I am pleased to be here today to discuss the Endangered Species Act (ESA). I will focus my remarks on NMFS' role in implementing the ESA, and a few areas of the ESA that warrant special attention to ensure species protection and recovery in the future.

**NMFS' Role in Implementing the ESA**

The ESA (16 U.S.C. 1531-1543; P.L. 93-205, as amended) requires NMFS and the U.S. Fish and Wildlife Service (FWS) to list species that are determined to be endangered or threatened, and to subsequently protect those species and their habitat. Pursuant to a 1974 Memorandum of Understanding between the two agencies, FWS has management authority for terrestrial and freshwater species, while NMFS manages marine species, including anadromous species that spend most of their life cycle in the ocean. NMFS currently manages 61 listed species.

The NMFS programs are coordinated by our Office of Protected Resources at NOAA's Silver Spring, Maryland, headquarters. These ESA activities are implemented through our Regional Offices and Fisheries Science Centers in cooperation with other Federal agencies, states, tribes, conservation groups, private property owners, and other members of the public. NMFS' management of many ESA-listed species also requires coordination with foreign nations. When necessary, our Office for Law Enforcement works with the U.S. Coast Guard and other partners to enforce provisions of the ESA.

Section 4(a) requires NMFS to determine whether a species should be placed on – or removed from – the Federal list of endangered or threatened species. This determination is based on a rigorous status review. These status reviews involve the public, States, Tribes, and local government in a process to collect and consider the best available scientific information. At the end of the status review, NMFS determines whether the species meets the threshold for listing.

If a species does not warrant listing but we have concerns that it may be in decline, we may designate it as a "species of concern." Species of concern are those species about which "NMFS has some concerns regarding status and threats, but for which insufficient information is available to indicate a need to list under the ESA." They may also include species "for which NMFS has determined, following a biological status review, that listing under ESA is 'not

warranted' ...but for which significant concerns or uncertainties remain" (64 FR 19975 - April 15, 2004). We have initiated pilot proactive conservation efforts aimed at these species of concern to minimize their risk of decline. Proactive conservation can be more cost-effective than recovering a species once it is listed. We work with interested partners using other authorities besides the ESA to rebuild these at-risk stocks. For example, our Northwest and Southwest Regions are relying on the authority provided in the Magnuson-Stevens Fishery Conservation and Management Act to work with the states and commercial and recreational fishing interests to rebuild bocaccio and other depleted groundfish stocks.

The listing of an endangered species generally protects the species from "take" by making it illegal to harass, harm, or kill a listed species. NMFS is required to address all activities that may impact an endangered species. However for threatened species, section 4(d) of the ESA provides some flexibility to permit activities that may not contribute to the decline of a species.

Section 7 of the ESA requires federal agencies proposing actions that may affect listed species to consult with NMFS or FWS to ensure that their proposed actions are not likely to jeopardize the continued existence of the species or adversely modify its critical habitat. The section 7 consultation process often concludes when NMFS issues a Biological Opinion, which presents NMFS' assessment of how the proposed actions would affect listed species. It offers measures to minimize take or reasonable alternatives that will not jeopardize the continued existence of the species or result in adverse modification to critical habitat.

Finally, the ESA requires development of recovery plans that identify conservation measures to recover listed species. NMFS works with other federal agencies, state and local governments, tribes, and private entities to develop and implement measures in these plans. These plans allow NMFS to prepare better informed analyses, inform other federal agencies on how to use their authorities, and guide cooperation with states and other interested parties.

Over the past few years, we have heard from our constituents and other parties affected by our implementation of the ESA that several aspects of our process need to be more transparent and scientifically sound. We are developing processes to improve transparency and consistency in listing decisions, consultations, and recovery planning that I would like to share with you today.

### **Improving the Prospects for Recovery of Species**

NMFS is required under section 4(f) to prepare recovery plans for all ESA-listed species. The recovery plan provides a roadmap for actions and funding priorities needed to remove the species from the list and ESA protections. We have been working with FWS to improve how we prepare recovery plans. For example, we are standardizing the process of identifying threats to listed species, communicating the threats to the public, and engaging the public in developing responses to the threats. In the future, we want our recovery plans to become living documents that provide meaningful guidance to our many partners.

Additional improvements can be made to aid recovery, including making the recovery planning process more timely. Currently we focus our limited resources on those areas of ESA that have strict statutory deadlines, such as listing and section 7 consultations. The President's FY 2006 Budget Request includes an increase of \$8.5 million for Pacific Salmon ESA recovery and

research activities, including section 7 consultations and recovery planning. We would like to put more emphasis on our recovery efforts in the future. To speed recovery, we need to focus our efforts beyond recovery *planning* into collaborative recovery *actions*.

### **Using the Best Available Information in an Open and Transparent Manner**

NMFS understands the importance of improving the quality of conclusions drawn from data used to implement the ESA and ensuring that decisions are based on the best data available. This has proved difficult in situations where policy decisions must be made when the information is limited.

NMFS biologists evaluate all information to ensure that it is the best available science. We incorporate independent peer review in listing and recovery activities. We devote a significant portion of our budget to allow our scientists to stay up-to-date in their respective fields, and to incorporate state-of-the-art analytical techniques and methods to assess and understand species and their ecosystems.

Over the past few years, we have dedicated substantial time and energy to systematically change how we implement the ESA in response to concerns about the quality of the science used in decision making. We focused these efforts on improving the processes regarding species listing as well as section 7 consultations.

Efforts to Improve Species Listing Determinations. A team of scientists (including NMFS and FWS) has been assembled to develop specific criteria for determining whether species qualify for listing as threatened or endangered. The scientists involved in this effort represent a cross section of the best scientific minds working on population ecology in the federal government. They are developing criteria that are transparent, repeatable, and based on the best scientific knowledge of population ecology and the process of species extinction. When this effort develops a working set of criteria, we will collaborate further with our Federal and state partners. We also plan to engage the larger scientific community and the public through workshops, presentations at scientific meetings, and papers published in peer-reviewed scientific journals.

Efforts to Improve the Section 7 Consultation Process. As I mentioned earlier, section 7 consultations require NMFS and FWS to render an opinion based on the best available data, which has proven difficult and sometimes controversial in situations where information is limited. To address concerns raised about the quality of the science that underlies these consultations, we have revised our process for consultations and preparing Biological Opinions. NMFS is designing an analytical framework for biologists and managers that provides a more consistent and transparent structure to our section 7 decisions regardless of whether information is limited.

NMFS and FWS personnel have worked for more than two years to develop this analytical framework, which makes the process of reaching conclusions transparent, objective, and reproducible, while continuing to protect threatened and endangered species from further declines. We have tested this framework in actual consultations, and in each case the framework provided the expected guidance and made the conclusions of our consultation more legally defensible. Soon, we will start preparing policy and guidance on the use of an application of the

framework, which we will finalize in a process that actively engages the larger scientific community, the public, and our federal and state partners.

For consultations on actions our agency takes under the Magnuson-Stevens Fishery Conservation and Management Act and related fisheries authorities, we are developing operational guidelines that weave section 7 consultations into our procedures for interacting with the Regional Fishery Management Councils. These operational guidelines are designed to address endangered species issues early in the process of developing fishery management actions, and to ensure that the Regional Fishery Management Councils have the information they need to integrate our obligation to protect and recover threatened and endangered species with our interest in the production of sustainable fisheries.

These changes seek to make the process more transparent to all parties involved in a consultation—action agencies, applicants, and other interested parties—and will engage them as active participants in the process of assessing the effects of federal actions on threatened and endangered species and designated critical habitat. Active and open discussions and exchanges of information between action agency, applicant, and our consulting biologists will now be at the center of the consultation process.

### **Designating Critical Habitat**

The designation of critical habitat continues to be both a challenge and a source of controversy. Critical habitat is defined as those areas “on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection.” The designation of critical habitat is one of the few areas of the statute where economics is taken into account—the Secretary may exclude habitat from a designation if the economic benefit of exclusion outweighs the benefit of inclusion and the exclusion will not result in extinction of the species.

Habitat conservation contributes to a comprehensive effort to recover species. However, much of our critical habitat resources are focused on litigation. One key reason these designations are controversial and litigious is a lack of understanding about exactly what habitat the species needs at the time of listing. At the time of listing, data about the distribution and habitat needs of species and land-use patterns is often not readily available.

Usually such data becomes available during the recovery planning process. Development of recovery plans requires collecting information on distribution, habitat needs, and activities affecting habitat. It also requires an analysis of how activities adversely affecting habitat need to be changed to conserve and restore habitat needed for recovery.

### **Increasing the Conservation Partnership Role of States**

Section 6 of the ESA identifies the states’ key role in conserving wildlife. NMFS and FWS recognize the important role of states in species recovery, and have worked to foster partnerships with them in this regard. We acknowledge that states possess broad trustee responsibilities over species and their habitats, compile valuable scientific data and expertise on the status and distribution of species. States often have a more constant working relationship with property owners and local governments.

Currently, eight Atlantic Coast states and two U.S. Caribbean territories have section 6 cooperative agreements with NMFS. These agreements encompass a total of 15 federally listed species and 23 species of concern under NOAA's jurisdiction. In 2003, Congress provided funding to NMFS to implement the section 6 program. Through a competitive grants program, NMFS awarded this funding to states and territories. Last year, section 6 funding supported research on sea turtles, shortnose sturgeon, Atlantic sturgeon, and smalltooth sawfish. NMFS has continued this competitive grants program with similar levels of funding in FY 2004 and 2005. NMFS has requested approximately \$1 million in the FY 2006 President's budget to be available as grants.

We are interested in exploring how to share more resources and responsibilities with our partners. We would like to work with the Committee on strengthening partnerships and removing potential hurdles to the partners' full involvement.

**Conclusion**

I want to thank you, Mr. Chairman and members of this Committee, for inviting me here to speak today. We look forward to working with you to improve ESA and to ensure available resources are spent on actions that benefit threatened and endangered species.