

WRITTEN STATEMENT OF
ERIC SCHWAAB
ASSISTANT ADMINISTRATOR FOR FISHERIES
NATIONAL MARINE FISHERIES SERVICE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE

ON
THE ENDANGERED SPECIES ACT: HOW LITIGATION IS COSTING JOBS AND
IMPEDING TRUE RECOVERY EFFORTS

BEFORE THE
COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

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Chairman Hastings, Ranking Member Markey, and Members of the Committee, thank you for the opportunity to testify before you today on the Endangered Species Act (ESA). My name is Eric Schwaab and I am the Assistant Administrator for Fisheries, within the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce. NOAA's National Marine Fisheries Service (NMFS) is dedicated to the stewardship of living marine resources and the promotion of healthy ecosystems, through science-based conservation and management. As a steward, NMFS conserves, protects, and manages living marine resources, including those that are listed under the ESA, to ensure functioning marine ecosystems and recreational and economic opportunities for the American public.

NMFS's 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 habitats. Pursuant to a 1974 Memorandum of Understanding between the two agencies, FWS has management authority for terrestrial and freshwater species, while NMFS manages most marine species, including anadromous species that spend most of their life cycles in the ocean. NMFS currently manages 82 listed species. We have proposed an additional 12 species to be listed and are evaluating the status of 94 candidate species for potential listing under the ESA, including 82 species of coral.

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. Listings, de-listings, and changes in status to listed species may be initiated by NMFS or by petition from any interested person. Once

a petition is received, NMFS must, to the maximum extent practicable, determine within ninety days whether the petition presents substantial information that the petitioned action may be warranted. If NMFS determines the petition presents such information, we initiate a review of the species' status and must determine whether to list the species within one year of receiving the petition. Should NMFS formally propose listing a species, we must make a final listing determination within one year of the proposal. Listing determinations are based on a rigorous status review. At the end of the status review, NMFS determines whether the species meets the threshold for listing. Listing decisions must be made solely on the basis of the best available scientific and commercial data available and follow a strict statutory timeline.

Once a species is listed, we are required to designate critical habitat for that species, promulgate protective regulations for threatened species, and develop 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.

The ESA also requires, through Section 7, that federal agencies proposing actions that may affect listed species consult with NMFS or FWS to ensure their proposed actions are not likely to jeopardize the continued existence of the species or adversely modify its critical habitat. This consultation process often concludes when NMFS issues a biological opinion, which presents NMFS's assessment of how the proposed actions would affect listed species and 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.

The ESA also permits "citizen suits," allowing any person to begin a civil suit on his own behalf:

- (A) to enjoin any person, including the United States and any governmental entity or agency of the United States who is alleged to be violating any provision of the ESA or regulations issued pursuant to the ESA;
- (B) to compel the Secretary of Commerce or the Interior (the Secretary) to apply take prohibitions with respect to the taking of any resident endangered or threatened species within any State; or
- (C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under Section 4 which is not discretionary.

Much of the ESA litigation has been focused on: listing and listing-related decisions such as findings on petitions to list; whether and how to list a species; the designation of critical habitat; and Section 7 interagency consultations, including whether a consultation is required and the outcome of consultation.

Since 2008, there have been approximately 61 cases filed challenging NMFS's Section 4 listing and critical habitat actions and Section 7 consultations. The majority of the cases have been filed by non-profit environmental organizations, while others have been brought by state and local jurisdictions, industry groups, tribes, and private citizens. For those cases in which a final decision has been issued and the timeframe for appeal has expired, NMFS has prevailed fully in the majority of its Section 7 cases (8 wins, 1 loss, and 6 settlements). Likewise, NMFS has prevailed fully in most of its Section 4 cases (3 wins and 1 loss) and has also settled 5 cases involving a failure to meet the ESA's statutory deadlines. The remaining cases are still pending in federal court.

While litigation poses inherent challenges, in some circumstances it has served as a useful tool in bringing diverse interests to the table. Ultimately, in moving beyond litigation and bringing parties together toward implementation of recovery objectives, NMFS has seen great potential for species recovery.

Improving the Prospects for Recovery of Species

The ESA has been instrumental in preventing species from going extinct and facilitating progress in recovering listed species. Recovery plans, a requirement for all ESA-listed species, provide a roadmap for actions and funding priorities needed to remove the species from the list and ESA protections. While we still face a number of challenges, we have begun to see the benefits of sustained conservation efforts for some of our species.

Kemp's Ridley Sea Turtles

Once described as the most imperiled of all marine turtles, by the 1960's the Kemp's ridley sea turtle had plunged to less than one percent of its historical population. Intense exploitation of turtle eggs and drowning of adult turtles in shrimp trawls were primarily responsible for the decline. Mexico established conservation programs in the 1960s to protect nesting females and their nests. In the United States, the Kemp's ridley has been listed and protected as an endangered species since the inception of the ESA. NMFS and FWS have worked cooperatively with Mexico, and with U.S. commercial fishermen through the development of turtle excluder devices, to address the threats that caused the decline of Kemp's Ridley sea turtles. The joint United States and Mexico recovery planning and conservation efforts have yielded benefits for the species. In recent years, we have observed an approximate 15 percent increase in Kemp's ridley nests per year at the species' main nesting beaches along the northeast coast of Mexico. In 1985, there were fewer than 300 females nesting each year. Today there are more than 6,000 nesting females. Currently, the Kemp's ridley is close to meeting one of the major recovery criteria for downlisting to threatened.

Pacific Salmon

Pacific salmonid populations are described as Evolutionarily Significant Units (ESU) for salmon and Distinct Population Segments (DPS) for steelhead. Seventeen ESUs and 11 DPSs of Pacific salmon and steelhead are currently listed as threatened or endangered under the ESA. While populations may vary from year-to-year, the long-term habitat restoration and protection activities of NMFS's conservation and recovery efforts have assisted in sustaining the species through changing conditions by addressing major limiting factors for each ESU and DPS. With the exception of Puget Sound steelhead and Central California Coast coho, all ESUs and DPSs with ten or more years of abundance data are currently stable or increasing.

NMFS has placed great emphasis on the recovery of Pacific salmon and recognizes the cultural, ecological, and economic significance that salmon play throughout the west coast. In the past several years, threats to Pacific salmon resulted in a consecutive three-year closure (2008-2010) of the once-thriving Pacific salmon fishery off the state of California. While this was a Magnuson-Stevens Conservation and Management Act closure, former Governor Arnold Schwarzenegger's Administration estimated that the closure of the salmon fishery in California in 2008 and 2009 resulted in the loss of more than \$500 million and cost nearly 5000 jobs, demonstrating the value of healthy salmon fisheries.

NMFS has achieved substantial recovery benefits for Pacific salmon through grant expenditures made under the Pacific Coastal Salmon Recovery Fund (PCSRF), established by Congress in fiscal year 2000 to protect, restore, and conserve Pacific salmonids and their habitats, and to address the impacts of the Pacific Salmon Treaty Agreement between the United States and Canada. Under PCSRF, NMFS provides funding to states and tribes of the Pacific Coast region (California, Nevada, Oregon, Washington, Idaho, and Alaska) to implement habitat restoration and conservation projects focused on improving the status of salmonid populations. Over the past decade, the PCSRF has had a positive impact on both salmon recovery and local economies. A 2009 study by the Ecosystem Workforce Program of the University of Oregon, entitled "A Preliminary Estimate of Economic Impact and Job Creation from the Oregon Watershed Enhancement Board's Restoration Investments" assessed the potential economic and employment impacts for watershed restoration activities proposed by the Oregon Watershed Enhancement Board. That study found that its proposed \$40 million investment in watershed restoration projects would create or retain nearly 600 jobs and generate over \$72 million in total economic activity in Oregon and leveraging additional funding could create or retain an additional 570 to 885 jobs and \$71 to \$110 million in additional total economic activity.¹ An extrapolation of these figures indicates that every \$1million invested in watershed restoration results in the creation of 29-37 jobs and a total economic impact of \$3.6-4.5 million.

Key accomplishments for PCSRF funded activities include:

¹ <https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/10791/bp13.pdf?sequence=1>.

- PCSRF projects have restored, protected, and made accessible nearly 870,000 acres of habitat. Degraded habitat is considered a major limiting factor in all areas where salmonid populations are listed along the Pacific Coast.
- Over 5,300 miles of stream have been opened by PCSRF projects since FY 2000.
- Nearly 240,000,000 fish have been marked supporting efforts to gather data for improved stock identification, more accurate fish abundance estimates, and more effective management of selective fisheries on hatchery fish. These markings improve harvest opportunities and provide economic benefits to communities throughout the region.

Next Steps: Improving the Implementation of the ESA

Regulatory Improvements. Although we have made significant progress in recovering some species, NMFS and FWS recognize that we can make implementation of the ESA more effective and efficient. In that regard, NMFS and FWS have been working cooperatively to improve the implementation of the ESA. In 2009, the NMFS and FWS sought public comment on potential changes to the Section 7 interagency consultation joint regulations. In response to these comments, to reflect lessons learned since these regulations were last updated in 1986, and as part of the Department of the Interior and the Department of Commerce's implementation of Executive Order 13563, "Improving Regulation and Regulatory Review," NMFS and FWS are developing joint regulations to update the ESA Section 7 implementing regulations. Specifically, we are working to define "destruction or adverse modification of critical habitat," which is used to evaluate whether and how federal activities can occur in critical habitat, and clarify the scope and content of the incidental take statements that are developed following a formal Section 7 consultation. These regulatory changes would make the Section 7 consultation process more consistent. In addition, clarifying the scope and content of the incidental take statement, particularly with regard to programmatic actions or other actions where direct measurement is difficult, will provide greater flexibility in the quantification of anticipated incidental taking. Ultimately, this could reduce the burden of developing and implementing biological opinions without any loss of conservation benefits.

The regulatory component of this initiative also includes updating the regulations governing the process for designating critical habitat for listed species to design a more efficient, defensible, and consistent process and developing additional incentives for voluntary conservation actions under the ESA.

Increased Cooperation with the States. Section 6 of the ESA recognizes the unique role States play in wildlife conservation. In recognition of the special and unique relationship among the States, FWS, and NMFS in protecting and managing fish, wildlife and plants, the NMFS and FWS have created a Joint Federal/State Task Force on Endangered Species Act Policy. The Task Force serves as a forum to cooperatively identify and address issues of national significance and to jointly develop recommendations concerning those issues in implementing the ESA. As

part of this Task Force's activities, the NMFS and FWS have reaffirmed the statement of joint policy, "Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities" (Federal Register, July 1, 1994, vol. 59, page 34275), which outlines the process for cooperating with, and seeking the input of the States in prelisting conservation activities, listing decisions, interagency consultations, and habitat conservation planning.

Increased Public Involvement. NMFS also recognizes that some species recovery activities are particularly controversial to the public and has taken steps in these circumstances to increase outreach to affected communities to explain our underlying conclusions about activities' impacts on protected species. Additionally, while all our decisions are guided by the best available science, we understand that the science related to many of our decisions evolves rapidly and as such have engaged external scientists in review of some of our broader-reaching consultations or decisions. In short, we understand that, by engaging affected communities/industries in our decision-making, we can achieve enduring species recovery success.

Conclusion

In conclusion, it is important to note that the ESA should not be evaluated solely by the number of species that have fully recovered and been removed from the list of threatened and endangered species. The ESA has been successful in stabilizing endangered and threatened species by addressing threats that caused their decline and promoting conservation programs that are designed for their recovery. By strengthening partnerships with states and others and maintaining our research and management efforts, we are best suited to promote the ecological, cultural, and economic benefits inherent in many of our listed species.

Thank you again for the opportunity to testify today. I would be happy to answer any questions.