

Testimony of Michael J. Bean  
Environmental Defense  
Washington, DC  
before the  
House Resources Committee  
July 19, 2005

Environmental Defense appreciates the opportunity to present this testimony to the Resources Committee. I am Michael J. Bean, co-director of Environmental Defense's Center for Conservation Incentives, which promotes the use of incentive-based strategies to achieve a variety of conservation goals, including the conservation of endangered species. For nearly thirty years, I have worked to further the conservation of endangered species throughout the country. My colleagues and I have worked cooperatively with farmers in California, ranchers in Texas and Utah, forest landowners in North and South Carolina, and other landowners elsewhere in an effort to find workable and effective means of conserving imperiled species. In addition to my duties at Environmental Defense, I have served on the Board on Environmental Studies and Toxicology of the National Research Council of the National Academy of Sciences and on the Board of Directors of the Environmental Law Institute. Very recently, I have joined the Board of Directors of Resources for the Future. My book, *The Evolution of National Wildlife Law*, is a leading text on the subject of wildlife conservation law in the United States.

The petition to list the eastern oyster as an endangered or threatened species under the Endangered Species Act highlights a number of important conservation policy issues. Environmental Defense has not taken a position on the petition itself. The petition's scientific merits – and the law is clear that a decision on the action the petition requests must be based on scientific evidence – can be better addressed by other witnesses. What I can address in this testimony are some of those important policy issues that the petition raises. In doing so, I hope to illuminate some of the options that exist, and to dispel some of the misperceptions that may also exist. The first thing to note is that since 1978, Congress has allowed less flexibility under the Endangered Species Act with respect to invertebrate wildlife than with respect to vertebrate wildlife. That is, for invertebrates that may be in conservation trouble, the law allows only two choices: list them everywhere or list them nowhere. For vertebrate wildlife, on the other hand, the law allows a third choice: list them only where they are at risk of extinction, while leaving them unlisted everywhere else. There are a number of examples in which the administrators of the Act have done just that. The bog turtle, for example, is listed in the Northeast, but unlisted in the southern portion of its range. The gopher tortoise is listed in the western portion of its range along the Gulf coast, and unlisted in the eastern portion of its range. The brown pelican is listed on the Pacific coast, but unlisted on the Atlantic coast. This flexibility makes it possible to focus both the resources and the regulatory requirements of the Endangered Species Act where they are most needed, and avoids the unnecessary imposition of such requirements where they are not.

For invertebrates, as I have noted, this same flexibility no longer exists. But it once did. When the Act was originally passed, Congress drew no distinction between vertebrates and invertebrates. Both could be listed at the species, subspecies, or population level. In the 1978 amendments to the Act, however, and at the behest of the House of Representatives, Congress reduced that flexibility, taking away the authority to list invertebrates at the population level. The legislative history for this action sheds little light on its rationale, but at least two possibilities seem likely. The first is that some in the House may have simply thought that invertebrates were less important than vertebrates. That view, though not uncommon, is seriously misinformed. Many invertebrates have exceptional economic as well as ecological importance. The most valuable commercial fishery in the United States, for example, is not directed at a fish, but rather at shrimp, which are invertebrates. Oysters are of obvious value economically, and are also of considerable ecological value because of their considerable role of filtering water. Sadly, both the economic and ecological values of oysters have been greatly diminished as a result of the failure of our land use, water pollution, and fishery management laws to maintain this enormous natural bounty. If one looks at a map of coastal communities along the East Coast, one sees places with names like Bivalve, New Jersey, Oyster, Virginia, and Shelltown, Maryland. Those names are testament to the importance that the once-rich natural bounty of oysters had for once-thriving communities. Most of those communities are thriving no more: the price of our inability to properly manage and sustain a once-abundant invertebrate resource has been lost jobs, devastated communities, a nearly vanished way of life, and towns with names that now seem like quaint historical artifacts.

Thus, providing less authority for, and less flexibility in, the protection of invertebrates than of vertebrates on the grounds that invertebrates are less important than vertebrates is a misguided policy. Another possible justification for the different treatment of vertebrates and invertebrates stems from the fact that invertebrates are far more numerous than vertebrates. Because invertebrate species greatly outnumber vertebrate species, the authority to list and protect distinct population segments of invertebrates might impose upon the Fish and Wildlife Service and NOAA Fisheries obligations that they lack the resources to fulfill. This is a legitimate concern, at least at current levels of funding for the endangered species program. The annual core budget for the Fish and Wildlife Service's administration of the Endangered Species Act is almost exactly equal to the projected cost of building one mile of the Intercountry Connector highway in nearby Maryland. Thus, if Congress is only willing to give the Fish and Wildlife Service each year the equivalent of one highway mile's worth of funding with which to try to conserve some 1,264 species in 50 states and several territories, there may be no practical alternative to the current all or nothing options for the listing of invertebrate species.

The second matter I wish to address is what the regulatory consequences of listing the eastern oyster would be. It is on this topic that I think there may be some misunderstanding. The concern has been expressed that the listing of the eastern oyster would result in the imposition of highly restrictive, uniform federal rules throughout the range of the oyster. In fact, this need not be the case, at least if the species were listed as threatened rather than endangered. Under a threatened designation, it would be possible to have one set of rules in areas where oysters are most acutely imperiled – Chesapeake Bay, for example – and entirely different rules in other areas. Indeed, in the latter areas, existing state rules could continue in effect, at least if NOAA Fisheries concluded that it was neither necessary nor advisable for the conservation of the oyster to promulgate different rules. That is because under section 4(d) of the Endangered Species Act, NOAA Fisheries would have the authority, in the event that it listed the oyster as a threatened fishery, to fashion such rules regarding taking and trade as it deemed necessary and advisable for the conservation of the species, including having no such restrictions at all in some areas.

There is one qualification to the foregoing statement. A threatened designation would not eliminate the requirement that federal actions that affect listed oysters would have to be reviewed pursuant to the consultation procedures of Section 7 of the Endangered Species Act. Thus, coastal dredging projects, federally funded expansions of coastal sewage treatment facilities, and other actions with similar potential to adversely affect oysters would receive scrutiny for their impacts on oysters, and might be required to reduce or offset any adverse impacts to the oyster resource. From the point of view of those undertaking such actions, that surely represents unwanted additional scrutiny and potentially additional cost for environmental mitigation. From the point of view of those trying to make their livelihoods by harvesting oysters, added scrutiny of those types of activities is probably welcome, inasmuch as it is activities such as those that have contributed greatly to the diminishment of our oyster resource and to the economic decline of the communities that once prospered from that resource.