

**WRITTEN TESTIMONY OF
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**HEARING ON
CONSULTATION PROCEDURES UNDER SECTION 7
OF THE ENDANGERED SPECIES ACT**

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

JULY 29, 2015

Introduction

Good morning, Mr. Chairman and Members of the Committee. Thank you for the opportunity to testify before you today. My name is Samuel D. Rauch III and I am the Deputy Assistant Administrator for Regulatory Programs for the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS) in the Department of Commerce. NMFS is dedicated to the stewardship of living marine resources through science-based conservation and management.

With global extinctions occurring at an unprecedented rate, the Endangered Species Act (ESA) was enacted to conserve threatened and endangered species and their ecosystems. Congress passed the ESA on December 28, 1973, recognizing that the natural heritage of the United States was of "esthetic, ecological, educational, recreational, and scientific value to our Nation and its people." It was understood that, without protection, many of our nation's living resources would become extinct. Currently, there are 2,220 species listed under the ESA, 1575 of which are in the U.S. and its waters

A species is considered endangered if it is in danger of extinction throughout all or a significant portion of its range. A species is considered threatened if it is likely to become endangered in the foreseeable future. The U.S. Fish and Wildlife Service (USFWS) within the Department of the Interior and NMFS share responsibility for implementing the ESA. NMFS is responsible for 125 marine species listed under the ESA, from whales and sea turtles to salmon and corals.

NMFS Implementation of the ESA

NMFS conserves and recovers marine resources by doing the following: listing species under the ESA and designating critical habitat (Section 4); developing and implementing recovery plans for listed species that will benefit from such plans (Section 4); developing and implementing protective regulations, where

necessary and advisable, for threatened species (Section 4), developing cooperative agreements with and providing grants to States for species conservation (Section 6); consulting on any Federal agency actions where the agency determines that the action may affect a listed species and/or its designated critical habitat and to minimize the impacts of incidental take (Section 7); working with U.S. agencies and foreign governments to ensure that international trade does not threaten listed species (Section 8); enforcing against violations of the ESA (Sections 9 and 11); cooperating with non-federal partners to develop conservation plans for the long-term conservation of species (Section 10); and authorizing research to learn more about protected species (Section 10).

How Species are Listed or Delisted

Any individual or organization may petition NMFS or USFWS to “list” a species under the ESA. If a petition is received, NMFS or USFWS must determine to the maximum extent practicable within 90 days if the petition presents enough information indicating that the listing of the species may be warranted. If the agency finds that the listing of the species may be warranted, it will begin a status review of the species. The agency must, within one year of receiving the petition, decide whether to propose the species for listing under the ESA. NMFS may, on its own accord, also initiate a status review to determine whether to list a species. In that instance, the statutory time frames described above do not apply. The same process applies for delisting species.

NMFS or the USFWS, for their respective species, determine if a species should be listed as endangered or threatened because of any of the following five factors: 1) present or threatened destruction, modification, or curtailment of its habitat or range; 2) overutilization for commercial, recreational, scientific, or educational purposes; 3) disease or predation; 4) inadequacy of existing regulatory mechanisms; and 5) other natural or manmade factors affecting its continued existence. The ESA requires that listing and delisting decisions be based solely on the best scientific and commercial data available. The ESA prohibits the consideration of economic impacts in making species listing decisions. The ESA also requires designation of critical habitat necessary for the conservation of the species; this decision does consider economic impacts.

The listing of a species as endangered makes it illegal to "take" (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to do these things) that species. Similar prohibitions may be extended to threatened species. Federal agencies may be allowed limited take of species through interagency consultations with NMFS or USFWS (the Services). Non-federal individuals, agencies, or organizations may be authorized for limited take for scientific research enhancement of survival, or through special permits with conservation plans. Effects to the listed species must be minimized and in some cases conservation efforts are required to offset the take. NMFS' Office of Law Enforcement works with the U.S. Coast Guard and other partners to enforce the ESA and prosecute for violations.

Interagency Consultation and Cooperation under Section 7 of the ESA

All Federal agencies are directed, under Section 7 of the ESA to utilize their authorities to carry out programs for the conservation of threatened and endangered species. Federal agencies must also consult with the Services on activities that may affect a listed species and/or its designated critical habitat. These interagency consultations are designed to assist Federal agencies in fulfilling their duty to ensure Federal actions do not jeopardize the continued existence of listed species and/or adversely modify their

designated critical habitat. Biological opinions document the Services' opinion as to whether the Federal action is likely to jeopardize the continued existence of listed species and/or adversely modify their designated critical habitat. Where appropriate, biological opinions provide an exemption for the "take" of listed species while specifying the amount or extent of "take" allowed, identifying the reasonable and prudent measures necessary to minimize impacts from the Federal action, and defining the terms and conditions under which such take is exempted from ESA prohibitions. Should an action be determined to be likely to jeopardize a species or adversely modify critical habitat, NMFS will suggest reasonable and prudent alternatives, which are alternative methods of project implementation that would avoid the likelihood of jeopardy to the species or adverse modification of critical habitat. Last year, NMFS completed 1,467 ESA consultations. However, NMFS is currently responding to over 2,100 requests for consultations, some of which are at a national level for many species.

Consultation Procedures under Section 7 of the ESA

Formal consultation is required if an action agency determines a proposed action "may adversely affect" listed species or designated critical habitat. Action agencies often submit a biological assessment to NMFS, USFWS, or both after a "may adversely affect" determination is made. These assessments describe the proposed project, action area, and effects of the action to listed species and their designated critical habitat. Once consultation has been initiated, the Services have 135 days to prepare a biological opinion that determines whether the action is likely to jeopardize the continued existence of listed species and/or adversely modify designated critical habitat. For complex projects, the Services may require more than 135 days and may work with the action agency to establish alternative consultation deadlines.

Informal consultation is an option when the action agency determines the proposed action "may affect, but is not likely to adversely affect" a listed species and/or designated critical habitat. A Federal agency, in the early stages of project planning, approaches the Service and requests informal consultation. Discussions between the two agencies may include what types of listed species may occur in the proposed action area, and what effect the proposed action may have on those species. If the Services believe that the action as proposed or with modifications meets the standard, they write a letter of concurrence in the determination and the consultation process ends. As of the 3rd quarter of FY-15, informal consultations made up 75% of all consultations.

Increasing Efficiencies and Successfully Implementing the Section 7 Consultation Process

Growing populations and development in coastal communities are increasing the need for Section 7 consultations. The Services recognizes these higher demands on our services and has asked for increased resources through the President's FY 2016 budget request. The budget proposes an increase of \$13.2 million to strengthen NMFS's consultation and permitting capacity required to meet mandates of the Endangered Species Act, as well as the Marine Mammal Protection Act and the Magnuson-Stevens Fishery Conservation and Management Act. Increased species listings, natural hazards such as wide-scale drought, and response to human-caused disasters, such as oil spills, all necessitate increased capacity to ensure that consultations and permits are completed in a manner that is timely and that enables the Nation's economic engine to move forward without unnecessary delays.

Due to the importance of timely consultations, NMFS is engaging with Federal action agencies to set priorities and better synchronize action agency needs with NMFS consultation capacity. Where possible,

NMFS is pursuing programmatic consultations. A programmatic consultation evaluates whether routine activities or authorizations enable the agency to identify and address potential threats posed to species and habitats protected under the Endangered Species Act. Programmatic consultations can increase the efficiency of the Section 7 consultation process by addressing recurring actions in one consultation rather than through individual consultations, and by facilitating an evaluation of aggregate risks to listed species and designated critical habitat across larger geographies or longer time frames.

Retrospective Review

NMFS and USFWS recently finalized regulations implementing the incidental take statement provisions of the ESA to clarify and codify the current policy regarding the use of surrogates, and address recent court decisions related to incidental take statements for programmatic Federal actions. These changes allow flexibility in the preparation of incidental take statements in situations where assessing and monitoring take of listed species may be difficult. There are several other actions that address other aspects of the ESA; a list can be found at: <http://open.commerce.gov/news/2015/03/20/commerce-plan-retrospective-analysis-existing-rules-0>.

NMFS and USFWS jointly announced on May 18, 2015 a set of initiatives to increase regulatory predictability, increase stakeholder engagement, and improve science and transparency. Among the actions are proposed revisions to interagency consultation procedures to streamline the process for projects, such as habitat restoration activities, that result in a net conservation benefit for the species.

Species Recovery

Recovery of threatened and endangered species is a complex and challenging process, but one which also offers long-term benefits to the health of our environment and our communities. Actions to achieve a species' recovery may require restoring or preserving habitat, minimizing or offsetting effects of actions that harm species, enhancing population numbers, or a combination of these actions. Many of these actions also help to provide communities with healthier ecosystems, cleaner water, and greater opportunities for recreation, both now and for future generations.

Partnerships with a variety of stakeholders, including private citizens, federal, state and local agencies, tribes, interested organizations, and industry, are critical to implementing recovery actions and achieving species recovery goals. Several NMFS programs, including the Species Recovery Grants to States and Tribes, the Pacific Coastal Salmon Recovery Fund, the Prescott Marine Mammal Rescue Assistance Grant Program, the Community-based Restoration Program, and funds from the American Recovery and Reinvestment Act provide support to our partners to assist with achieving recovery goals. From 2000-2013, the Pacific Coastal Salmon Recovery Fund has provided \$1.09 billion in funding to support partnerships in the recovery of listed salmon and steelhead. With this funding, states and tribes have leveraged additional resources to collectively implement 11,500 projects to conserve West Coast salmon. From 2003-2015, the Species Recovery Grant Program to states has awarded \$43 million to support state and tribal recovery and conservation efforts for other listed species - from abalone to whales – in every coastal region of the U.S. The FY 2016 Request includes an increase of \$17.0 million for Species Recovery Grants to address high priority recovery and conservation actions for ESA listed species. From 2001-2014, the Prescott Program awarded over \$44.8 million in funding through 483 competitive and 28 emergency grants to Stranding Network members to respond and care for stranded marine mammals,

including those listed under the ESA. From 2001-2014, the Community-based Restoration Program awarded over \$49 million through 644 competitive awards and sub-awards to provide habitat for species listed as threatened and endangered under the ESA. The Community-based Restoration Program also supported implementation of restoration projects funded through the American Recovery and Reinvestment Act of 2009. Of the \$155 million awarded to create habitat and jobs under the American Recovery and Reinvestment Act of 2009, \$63 million was awarded to projects benefiting listed species.

A strong example of how NOAA is leveraging our expertise to protect and recover listed fish species is in California's Russian River watershed, one of NOAA's ten Habitat Focus Areas. The Forecast-Informed Reservoir Operations (FIRO) project involves scientists from NOAA, U.S. Army Corps of Engineers, U.S. Geological Survey, Bureau of Reclamation, State of California, Sonoma and Mendocino Counties, and Scripps Institution who are conducting a pilot study to determine whether more sophisticated hydro-meteorological forecasting data can be used to better inform water management decisions. This non-regulatory, R&D effort could potentially improve efficiency and flexibility in managing existing water supplies to benefit all users and the listed species.

ESA Successes

The ESA has been successful in preventing species extinction—less than 1 percent of the species listed have gone extinct. Despite the fact that species reductions often occur over long periods of time, in only its 40 year existence, the ESA has helped recover over 30 species. NMFS recently delisted the Eastern population of Steller sea lion, our first delisting since 1994 when NMFS delisted the now thriving eastern population of Pacific gray whales. Between October 1, 2012, and September 30, 2014, of the 86 domestic endangered or threatened marine species listed under the ESA, 29 (34 percent) were stabilized or improving, 11 (13 percent) were known to be declining, 8 (9 percent) were mixed, with their status varying by population location, and 38 (44 percent) were unknown, because we lacked sufficient data to make a determination.

In addition to Pacific gray whales and Eastern Steller sea lions, ESA recovery actions have stabilized or improved the downward population trend of many marine species. For example, humpback whale populations are currently growing by 3-7 percent annually, enough to for NOAA to propose revising the listing status of some populations. In 2013, we saw record returns of nearly 820,000 adult fall Chinook salmon passing the Bonneville Dam on their way up the Columbia River to spawn. This is the largest number of fall Chinook salmon to pass the dam in a single year since the dam was completed in 1938, and more than twice the 10-year average of approximately 390,000. Once numbering in the thousands, the North Atlantic right whale, which is one of the most endangered whales to inhabit our coastal waters, dropped in population to a few hundred due to directed harvest. Now, the western North Atlantic right whale population is exhibiting promising signs of recovery and is thought to number about 450 whales, growing at about 2.7 percent each year.

We face continuing challenges in recovering numerous other species. Declines in coastal habitat, from wetlands to coral reefs, are often a significant hurdle to recovery. As stresses on coastal ecosystems increase, it is important to place a priority on habitat protection and restoration in order to prevent any need for listings and to facilitate recovery for species already listed.

Current and Proposed Listing Actions.

The Services currently have thirteen proposed listing actions and another three proposed critical habitat designations either proposed or under development for publication in the Federal Register.

Conclusion

Each plant, animal, and their physical environment is part of a complex web of ecological relationships. Because of this, the extinction of a single species can cause a cascade of negative events to occur that affect many species. Endangered species also serve to indicate larger ecological problems that could affect the ecosystem including humans. As important, species diversity is part of the natural legacy we leave for future generations. The wide variety of species on land and in the oceans has provided inspiration, beauty, solace, food, livelihood and economic benefit, medicines and other products for previous generations. The ESA is a mechanism to help guide conservation efforts, and to remind us that our children deserve the opportunity to enjoy the same natural world we experience.

Thank you again for the opportunity to discuss Section 7 of the Endangered Species Act. I am available to answer any questions you may have.