

**TESTIMONY OF
DR. REBECCA LENT
DEPUTY ASSISTANT ADMINISTRATOR FOR FISHERIES
NATIONAL MARINE FISHERIES SERVICE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE**

ON AMENDMENTS TO THE ENDANGERED SPECIES ACT

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

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Mr. Chairman and members of the Committee, I am pleased to be here today on behalf of William Hogarth, the Assistant Administrator for the National Marine Fisheries Service (NMFS). I welcome the opportunity to discuss with you our views regarding H.R. 2829 and H.R. 3705, two bills that would amend the Endangered Species Act of 1973.

Although both H.R. 2829 and H.R. 3705 specifically address the Department of the Interior's implementation of the Endangered Species Act (ESA), NMFS welcomes the opportunity to comment on these bills as they affect ESA decisionmaking generally. NMFS supports the goals of improving the quality of science used to implement the ESA and to ensure that Federal policy decisions are based on the best scientific and commercial data available. We are already working with the United States Fish and Wildlife Service (FWS) to identify areas where we can improve Federal implementation of the ESA administratively.

Before I comment more specifically on the bills, I would like to outline our current process for utilizing scientific data and information on ESA-related actions.

NMFS is a partner with the FWS in implementing the Endangered Species Act. Together, we have sought to administer the ESA efficiently and consistently while using the best available scientific and commercial data. This is sometimes difficult, particularly when policy decisions must sometimes be made with data or science that is still developing. NMFS is responsible for over 50 listed species that are, for the most part, wide-ranging, highly migratory and cover millions of square miles of ocean and thousands of miles of U.S. rivers, streams and coastline. Several species are co-managed by NMFS and FWS, such as the Atlantic salmon and four species of sea turtles. Others include anadromous and freshwater species that migrate through the same watersheds, and require close coordination between the agencies.

The ESA requires the Services to use the best available scientific and commercial data when implementing the Act. That is the standard we use for listing determinations as well as writing biological opinions. In 1994, NMFS and FWS provided further guidance to our staffs through policies on information standards and peer review. Let me describe those

policies in greater detail.

Information Standards

To assure the quality of the biological, ecological and other information utilized by the Services to implement the Act, we require NMFS biologists to evaluate all scientific and commercial information that will be used to make decisions under the Act to ensure that the information is reliable, credible, and represents the best available. Further, our biologists gather and impartially evaluate biological, ecological and commercial information that disputes official positions, decisions, and actions proposed or taken by the Services, and they are required to document their evaluation of information that supports or does not support a position being proposed as an official agency position on a status review, listing actions, recovery plans, biological opinions or permits.

Also, they must use primary and original sources of information as the basis for recommendations to place a species on the list of candidate species; add a species to the threatened and endangered list; remove a species from the list; designate critical habitat; revise the status of a species, issue a scientific research or incidental take permit, or make a determination that a Federal action is likely to jeopardize a species or destroy or adversely modify critical habitat. These sources are retained as part of the administrative record supporting an action and referenced in all Federal Register notices and biological opinions. Further, the Services must conduct management-level review of documents developed and drafted by Service biologists to verify and assure the quality of the science used to establish official positions, decisions, and actions taken by the Services to implement the ESA.

Peer Review

It is NMFS= policy to incorporate independent peer review in listing and recovery activities during the public comment period. For listing, we solicit the expert opinions of three appropriate and independent specialists regarding pertinent scientific or commercial data and assumptions relating to the taxonomy, population models and supportive biological and ecological information for species under consideration for listing. We summarize in the final decision document the opinions of all independent peer reviewers and include all reports, opinions and other data in the administration record of the final decision.

For recovery plans, we actively solicit independent peer review to obtain all available scientific and commercial information from appropriate local, state and Federal agencies, tribal governments, academic and scientific groups and any other party that may possess pertinent information during the development of recovery plans. Where appropriate, we use independent peer review to review scientific data relating to the selection or implementation of specialized recovery tasks. We summarize in the final recovery plan the opinions of all independent peer reviews requested to respond and include the reports and opinions in the administrative record.

It is our policy to select peer reviewers from the academic and scientific community, tribal and other native American groups, Federal and State agencies and the private sector. Those selected must have demonstrated expertise and specialized knowledge related to the scientific area under consideration.

If there is a scientific disagreement concerning the listing of a species, the ESA provides for NMFS to extend the statutory rulemaking deadline for six months to consider the uncertainty. NMFS may appoint a special independent peer review group to resolve any unacceptable level of scientific uncertainty. The results of this review become part of the permanent administrative record. The public is given an opportunity to review reports and provide comments for actions where there is a formal public comment period such as listing, designating critical habitat and developing a recovery plan.

We devote a significant portion of our budget to ensure that our scientists stay up-to-date in their respective fields, and that they incorporate state-of-the-art analytical techniques and methods to assess and understand species and their ecosystems. Science is a vital component to the development of sound ESA decisionmaking. That is why nearly half of NMFS= full time employees across the nation work in the Protected Species program in our Science Centers.

Contents of Petitions

In 1996, NMFS and FWS published specific guidance on what a petition must include before it will be accepted. This guidance covers petitions to list a species, petitions to change the status of a species, or to designate critical habitat. The 1996 guidance augments information standards outlined in joint-NMFS and FWS regulations issued in 1984.

Role of States

NMFS and FWS recognize the important role of States in species recovery, and have worked to foster partnerships with States in this regard. In 1994, the Services published a policy clarifying the role of States in activities undertaken by the NMFS and FWS to implement the ESA. Whether through species conservation prior to listing, listing itself, consultations, habitat conservation plans or recovery plans, we acknowledge that States possess broad trustee responsibilities over fish, wildlife and plants and their habitats. We agree that state agencies compile valuable scientific data and expertise on the status and distribution of species.

State agencies also have close working relationships with local governments and landowners and are in a unique position to assist NMFS and FWS with species conservation. With regard to biological opinions, it is Service policy to inform state agencies of Federal actions that may adversely affect listed species and to request information from the States that would assist the Services in analyzing the effects of the action. The Services and/or the appropriate Federal agency provide States with copies of the final biological opinion, and we encourage Federal agencies to share draft biological opinions with the States when the opinion may affect state activities.

Time Allowed For Peer Review, Science and Biological Opinions

As Dr. Hogarth testified last week before the House Resources Committee hearing on the National Academy of Sciences report on the Klamath Basin, NMFS is aware of concerns about the scientific validity of the information used to develop biological opinions, and we are now in the process of addressing these concerns in the biological opinion for the Klamath Basin. However, NMFS is required by law to make decisions based upon the best scientific and commercial data available. In writing a biological opinion we use all the information

available to us. Frequently, information used to develop an opinion is derived from a biological assessment or evaluation that is submitted from the agency or entity requesting consultation, and NMFS cannot control whether the information in such an assessment has previously been peer reviewed.

Both NMFS and FWS issue a large number of biological opinions every year. While we would, of course, prefer to always use information that has first been peer reviewed, time constraints do not always allow that to occur. The statutory time frame for completing biological opinions is short. Under existing procedures, action agencies and applicants are permitted to review and comment on draft opinions and may extend the consultation schedule to insure that they have a reasonable amount of time to conduct their review. They may also seek additional review by outside experts.

Views on H.R. 2829 and H.R. 3705

H.R. 2829, the A Sound Science for Endangered Species Act Planning Act,[@] would require the Secretary of the Interior to give greater weight to scientific or commercial data that is empirical or has been field-tested or peer-reviewed. While we support the goal of basing our decisions on sound science and peer reviewed science, we believe that if we give greater weight to scientific or commercial data that is empirical or field tested, when evaluating comparable data, we may not be using the best information available. There are other scientific methods (e.g., modeling and statistical analyses) that produce valuable scientific data. It is usually a combination of various types of scientific data that form the basis of our evaluations.

Our current policies and practices already reflect some of the language in this bill. For example, we do request data from landowners or any other party with information about a species when we are in the process of listing a species or preparing a recovery plan. This information becomes a part of the administrative record. Peer review is already required for listing determinations and development of recovery plans. However, this bill's requirement for peer review (e.g., recommendations from the National Academy of Science, compensation for peer reviewers and including jeopardy biological opinions found in Section 3) goes beyond what is in place now by the Service and would make it more difficult to meet the statutory timeframe for ESA decisions.

Section 4 of the bill calls for the use of information from states for recovery plans. Again, this is a current practice of the Service and often, there is a state representative on the recovery team itself. NMFS supports opportunities for the action agency and the applicant to participate in the development of biological opinions and, in fact, our regulations cover some of the proposals here. We would be glad to work with the Committee to expand meaningful participation in a way that, again, would be within the statutory deadlines for completing opinions.

H.R. 3705, the A Sound Science Saves Species Act of 2002,[@] also covers using sound science by addressing the contents of petitions to list a species and independent peer review of ESA decisions including jeopardy biological opinions. I will focus my remarks on Section 3(d) and the requirement for independent peer review of jeopardy biological opinions.

NMFS is concerned that this proposal could interfere with existing or new economic activities that require a biological opinion, because it could block the action agency or applicant from taking any action for at least 30 days after receiving a biological opinion if

any third party requests independent scientific review of the opinion. By itself, this language extends the consultation period from 135 days to 165 days. The additional 90 days for scientific review would extend the consultation to 255 days, and public notice requirements would extend the consultation to 285 days.

Even without the additional administrative procedures, these provisions more than double the amount of time needed to complete consultations. These changes would not necessarily change the outcome, increase the degree to which action agencies or applicants are involved in the outcome, or increase the scientific rigor of the consultation. At the same time, they would limit the flexibility and authority of the Secretary to expedite the processing of biological opinions for urgent activities.

In addition, the provisions requiring the establishment and selection of Independent Scientific Review boards could duplicate or compete with existing Federal, state, tribal, and local efforts to provide personnel and resources for peer review of ongoing species recovery projects, such as the Independent Scientific Review Panel that currently reviews hundreds of millions of dollars worth of salmon recovery projects in the Columbia River Basin in the Pacific Northwest.

Mr. Chairman, while we express concerns with some provisions of these bills, we recognize that we must continue to ensure that all actions taken to implement the Endangered Species Act are performed using the best scientific and commercial information and data available. We must also strive to improve the quantity and quality of data available. We look forward to working with Members of Congress and our partners at the FWS to bring about more effective implementation of the Endangered Species Act.

This concludes my testimony, Mr. Chairman. I would be glad to answer any questions you may have.