

## **Endangered Species Updated - December 1996 - Vol. 13, No 12**

### **Overview of the Legislative Mandates and the Agencies Responsible for Implementation of Southern Sea Otter Protection Under the Endangered Species Act**

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When Congress passed the Endangered Species Act (ESA; 16 U.S.C. 1531 et seq.) in 1973, it set clear public policy that we were to act to prevent the destruction of nature's diversity. The ESA is one of the most comprehensive pieces of environmental legislation ever enacted by Congress, calling for the conservation of threatened and endangered species, and, more importantly, the ecosystems upon which they depend. The ESA also established a strong leadership role for the federal government in the conservation of species at risk of extinction. To accomplish the objectives of the ESA, Congress envisioned a network of international, national, federal, state, and private organizations working toward common goals. Coordination among these agencies and organizations, private individuals, and major land users is perhaps the most essential ingredient for the successful implementation of the ESA.

Fundamentally, the ESA is habitat-oriented. It seeks to conserve "the ecosystems upon which endangered species and threatened species depend." This orientation has been embraced by the federal government in its increased efforts to address listing and recovery on a multi-species, ecosystem-wide basis wherever possible. It is doubtful that anyone anticipated in 1973 what a large, complex, and sometimes contentious job this would become. However, there has been a continuing underlying commitment throughout society and its various institutions that the goal of protecting species is important for the Nation.

Under the ESA, the Secretary of the Interior, acting through the U.S. Fish and Wildlife Service (FWS), oversees the protection and conservation of fish, wildlife, and plants found to be in serious jeopardy. The Secretary of Commerce, acting through the National Marine Fisheries Service (NMFS), is given similar authority for most marine life. NMFS is generally responsible for most marine species, except birds, and the FWS is generally responsible for birds and terrestrial and freshwater species. The southern sea otter is an exception, however, and along with the West Indian manatee and sea turtles (on land), remains under the FWS's jurisdiction.

Protecting endangered and threatened species and restoring them to a secure status in the wild is the primary objective of the endangered species program. Endangered species responsibilities for both NMFS and FWS include listing, reclassifying, and delisting species; providing biological opinions to federal agencies on activities that may affect listed species; enforcing species protection; providing technical assistance to the states and other non-federal applicants in the development and implementation of habitat conservation plans; overseeing recovery activities for listed species; providing for the protection of important habitat; and providing grants to states to assist with their endangered species conservation efforts.

#### **Listing**

The listing process is one of the basic functions performed by the FWS in carrying out its responsibilities under the ESA. Species are classified as either endangered or threatened. The ESA defines endangered species as any species in danger of extinction throughout all or a significant portion of its range. Threatened species include any species likely to become endangered in the foreseeable future throughout all or a significant portion of its range. A species is added to the list when its survival is found to be threatened by one or more of the following factors: the present or threatened destruction, modification, or curtailment of the species' habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or man-made factors affecting the species' continued existence.

In order to list a species, the FWS must follow a strict legal process known as a "rulemaking procedure." Changes or additions to the list are accomplished through a rulemaking process involving publishing a proposal in the Federal Register, allowing opportunity for public comment (including holding public hearings) and adoption of a final determination. To ensure that all potentially interested parties are made aware of the proposal, the FWS issues news releases, conducts special mailings, and directly informs the scientific community and other federal and state agencies. A final rule listing the species as endangered or threatened must be published within one year of the proposal, with a possible six-month extension to gather more data if there is scientific conflict, or the proposal must be withdrawn. The ESA provides that listing decisions must be based solely on the basis of the best scientific and commercial data available.

The southern sea otter was listed as threatened in 1977 due to its small population and limited distribution, and to threats from oil spills, pollution, and competition with humans. A major oil spill from a tanker in the vicinity of the southern sea otter is considered the most serious threat (see Bonnell et al., this issue). Drowning in gill and trammel nets was a significant cause of sea otter mortality in the past until the State of California banned the use of these nets within the otter's range (see Wendell, this issue).

## **Recovery**

Recovery, the ultimate purpose of the endangered species program, is the process by which the decline of an endangered or threatened species is arrested or reversed, or threats to its survival neutralized so that its long-term survival in nature can be ensured. This process requires the maintenance of secure, self-sustaining wild populations of species with the minimum necessary investment of resources. The primary objectives of the recovery program, while working in close cooperation with our partners, are to: (1) identify those ecosystems and species that face the highest degree of threats; (2) determine tasks necessary to reduce or eliminate the threats; (3) apply the limited resources available to the highest priority recovery tasks; and (4) reclassify and delist species as appropriate.

The first step in the recovery process is to initiate recovery actions needed to stop the species' decline. At the same time, species-specific recovery goals are developed and species information and management needs are identified and ranked in terms of their relative importance. This information is typically set forth in a recovery plan. A recovery plan delineates, justifies, and schedules the research and management actions necessary to support recovery of the species, including those that are likely to permit the reclassification or delisting of the species. These plans are comprehensive documents that identify all known recovery actions for a species and associated costs by all cooperating partners. They serve as blueprints for private, federal, and state cooperation in the implementation of recovery actions.

A recovery plan for the southern sea otter was developed and finalized by the FWS in 1982. This plan identified as the primary management actions the need to minimize the risk of tanker accidents and minimize the possible effects of oil spills. Establishing one or more sea otter colonies outside their present range was identified as the primary task since population growth was minimal. In the mid-1980s, however, federal and state biologists determined that the accidental entanglement and drowning of sea otters in gill and trammel nets was the likely factor limiting population growth. Since then the state of California has effectively restricted within sea otter habitat the use of nets that accidentally drown sea otters, and population growth has subsequently resumed. In 1989, the FWS reconstituted the Southern Sea Otter Recovery Team (SSORT) and requested the team to review and recommend changes to the existing recovery plan. In 1996, the FWS released a draft revised recovery plan for public review (cited in this issue as US Fish and Wildlife Service 1996). The main objective of this revised plan is to "passively allow" the currently increasing sea otter population to continue to grow to a size that otters will likely persist following any natural or human-caused disturbance (see Benz, Recovery Plan, this issue).

Coordination among federal, state, and local agencies, conservation organizations, appropriate experts, and major land users is a key ingredient for effectively implementing a recovery program. The recovery planning process is designed to allow potentially affected segments of the public to participate in planning and implementation and to provide comments to facilitate coordination between groups. Such coordination allows the special local knowledge of affected communities to be fully considered. This

understanding can serve to reduce or eliminate human use conflicts with listed species and their habitats. The FWS recognizes that public support is vital to long-term survival and recovery of threatened and endangered species, and the public is invited to provide comments on draft recovery plans.

The revised recovery plan was drafted by the SSRT. Leading the team is Dr. Douglas DeMaster, NMFS; Dr. David Duggins, University of Washington; Dr. James Estes, National Biological Survey; Dr. Michael Martin, California Department of Fish and Game; Dr. Katherine Ralls, National Zoological Park; Dr. Calos Robles, California State University, Los Angeles; Dr. Ulysses Seal, Veterans Administration Medical Center; and Dr. Donald Siniff, University of Minnesota. Carl Benz from the FWS's Ventura Field Office serves as the SSRT's Executive Secretary. The SSRT also received assistance from technical consultants, experts in science, and representatives from other federal and state agencies and non-government interests, among them, environmental groups, fishing interests, and the oil industry. In addition, the FWS held public hearings on the revised plan to solicit additional comments.

The tools available for recovery of listed species are numerous and may include reintroduction of species into formerly occupied habitat, land acquisition, captive propagation, habitat restoration and protection, population assessments, research, law enforcement, and technical assistance for landowners and public education. These efforts must allow time for an endangered species to respond biologically to the activities and protective efforts implemented on its behalf. Recovery activities conducted by the FWS and its partners include: defining threats through research on biological requirements, managing threats through habitat protection and restoration, and achieving a stable or upward population trend for an endangered species.

Development and implementation of a translocation plan was considered one of the FWS's primary recovery tasks in the 1982 southern sea otter recovery plan. By establishing a second breeding colony of sea otters into unoccupied habitat within their historic range, the FWS's goal was to reduce the probability that more than a small portion of the otter population could be decimated by a single natural or human-caused disaster. Translocation and subsequent management actions required Congress to broaden the FWS's authority. Pub. Law 99-625 was enacted in 1986 allowing the FWS to develop and implement a translocation plan. This law required the FWS to establish a management zone surrounding the translocation zone. Any sea otters found in this management zone were to be removed using non-lethal means and returned either to the translocation zone or the range of the parent population. In addition, any sea otters found in the management zone would be considered to be a part of an experimental population, and, as such, would not be afforded the same stringent protection as otters found in the parent population. A total of 139 sea otters were translocated from central California to San Nicolas Island in the Channel Islands between 1987 and 1990 (see Benz, Attempts to Reintroduce, this issue).

### **Ban on takings and other statutory prohibitions**

Once a species is officially listed as endangered or threatened, it is given full legal protection under the ESA. The ESA prohibits the import, export, or interstate or foreign sale of listed animals and plants (including their parts and products) without a special permit. Section 9 of the ESA prohibits specified acts which directly or indirectly harm listed species. Unlike other major ESA provisions, section 9 restrictions apply not only to federal agencies and permittees, but to all persons subject to United States' jurisdiction. Also, the protection afforded to plants differs from the protection extended to fish and wildlife, and provisions applicable to endangered species differ from those applied to threatened species. Section 9 of the Act prohibits "taking" of endangered animals. Taking is defined to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct." Also prohibited by section 9 is the transportation and sale of protected wildlife and the importation or exportation of any listed endangered species or products derived from them.

There is a significant legal distinction between threatened and endangered species with respect to the ESA's prohibitions. This difference provides a measure of administrative flexibility. The ESA's general prohibitions are applied by statute for endangered species but not for threatened species. ESA section 4(d), however, requires the issuance of regulations deemed necessary and advisable to provide for the

conservation of threatened species. Regulations may be as restrictive as the section 9 prohibition for endangered species, or may be less restrictive if the full range of protection is not believed to be needed.

The ESA provides for broad statutory exceptions to the taking prohibitions. Provisions of section 7 allow for the issuance of an incidental take statement to federal agencies, which must identify measures to minimize the impact of incidental take on the species. Section 10 outlines a permit process to allow the FWS to grant the permits for taking of listed species. These permits are granted in accordance with the terms of an approved habitat conservation plan, and must meet a number of requirements to mitigate effects on listed species. Taken together, these provisions are designed to allow economic development that will not "appreciably reduce the likelihood of the survival and recovery of species in the wild."

### **Cooperation with the states/territories**

State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the FWS in implementing all aspects of the ESA. Section 6 of the ESA authorizes the FWS to enter into cooperative agreements with states that establish and maintain a program for the conservation of endangered and threatened species. Under section 6, the FWS provides 75 percent of project funds (90 percent when two or more states cooperate on the same species) that can be used for tasks covering all phases of ESA implementation, from candidate conservation to recovery and delisting. Although chiefly a federal undertaking, the sea otter translocation was accomplished under State of California permits as well as federal permits and with the assistance of biologists and law enforcement personnel from both the FWS and the California Department of Fish and Game.

### **Conclusion**

As Mollie H. Beattie, former Director of the FWS, said, "Our fate and that of our economy are linked to natural systems. We cannot eliminate species and expect our own to survive. I would have liked to have stopped the ridicule about the conservation of snails, lichens, and fungi and instead move the debate to which ecosystems are the most recoverable and how we can save them, making room for them and ourselves."

The southern sea otter's struggle for survival has helped raise public awareness of the plight of endangered species in the United States and worldwide. The ESA obliges us to maintain our commitment to conserve imperiled species for the benefit of future generations as well as our own. The ESA has been responsible for improving populations of declining species throughout the United States and has served as a model for international conservation efforts. Implementation of the ESA, by building stronger partnerships with states, local governments, private industry, and individuals; by exercising greater administrative flexibility to minimize socioeconomic effects; and by reducing delay and uncertainty for states, governments, private industry, and individuals will preserve ecosystem health and sustainability into the future.

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