

# The Endangered Species Act



Loggerhead hatchlings heading to sea,  
photo courtesy of Matthew Godfrey

## Background

The Endangered Species Act (ESA) provides for the conservation of species that are threatened with extinction throughout all or a significant portion of their range. It also affords protection to the ecosystems on which these species depend. Enacted in 1973, the law evolved from the belief that "damage has been done", meaning that various species have already been rendered extinct and that the protection of species threatened with extinction is critical. The recovery of species in decline is important as such species hold esthetic, ecological, educational, historical, recreational and scientific value. Also, there is great value in maintaining biodiversity as it promotes overall fitness and resilience to an ecosystem.

## ESA and Fishery Management Plans

Since a number of ESA-listed species are known to interact with fishing gear, potential impacts to these species need to be addressed when a fishery management plan is developed or amended. Likely impacts to habitat designated as critical to the species' recovery as well as recommendations in a species' recovery plan also need to be taken into account.

Prior to approval of a fishery management plan, a consultation pursuant to Section 7 of the ESA must be conducted. This is to ensure that the proposed action is not likely to jeopardize the continued existence of ESA-listed species or result in the destruction or adverse modification of designated critical habitat. Consultation is between the agency proposing the action and, depending on the species, National Marine Fisheries Service (NOAA Fisheries) or the U.S. Fish and Wildlife Service (USFWS).

## Section 4: Listing, Critical Habitat and Recovery Plans

Species are considered for listing either at the initiative of NOAA Fisheries, the USFWS or as a result of a petition by an interested person or group. The determination of listing is based on the best scientific and commercial data available, assessed in terms of the five statutory listing factors: 1) present or threatened destruction, modification or curtailment of habitat or range; 2) overutilization for commercial, recreational, scientific or educational purposes; 3) disease or predation;

## Listed Species in the South Atlantic Council's Area of Jurisdiction

### Under NOAA Fisheries jurisdiction

#### *Endangered*

|                    |                      |
|--------------------|----------------------|
| Blue whale         | Hawksbill turtle     |
| Humpback whale     | Kemp's Ridley turtle |
| Fin whale          | Green turtle*        |
| Right whale        | Smalltooth sawfish   |
| Sei whale          |                      |
| Sperm whale        | <i>Threatened</i>    |
| Leatherback turtle | Loggerhead turtle    |

### Under USFWS jurisdiction

#### *Endangered*

Bermuda Petrel  
Roseate Tern\*\*

\*Green turtles in U.S. waters are listed as threatened except for the Florida breeding population, which is listed as endangered. Due to the inability to distinguish between populations away from nesting beaches, green turtles are considered endangered wherever they occur in U.S. waters.

\*\* North American populations are federally listed as endangered on the Atlantic coast from NC northwards and listed as threatened elsewhere.

4) the inadequacy of existing regulatory mechanisms; or 5) other natural or man-made factors affecting their continued existence.

## Critical Habitat

Destroying the habitat of an endangered or threatened species is equivalent to destroying the species itself. Thus, the ESA includes provisions to conserve the ecosystems upon which endangered and threatened species depend by designating critical habitat when a species is listed (unless the critical habitat is indeterminable or designation would be imprudent). Critical habitat is defined as specific areas within the species' range on which are found physical or biological features that are: 1) essential to conservation of the species, and 2) which may require special management considerations or protection.

Critical habitat provisions only apply to activities that are federally authorized, funded or implemented. Designation also does not preclude all uses of the habitat; only those that destroy or adversely modify the critical habitat.

When designating critical habitat, the Secretary (of Commerce or Interior) must consider the best scientific data available as well as economic and other relevant factors.

Currently, the only critical habitat designated within the South Atlantic Council's area of jurisdiction is the northern right whale's calving area off Florida and Georgia (59 FR 28793; June 3, 1994).

#### Recovery Plans

To help meet the goal of species recovery, the ESA requires the development and implementation of recovery plans for all listed species. Plans are required to be "as explicit as possible" and should contain "discrete measures to be taken for the species". Recovery plans include: 1) descriptions of "site-specific" management actions; 2) "objective, measurable criteria" to determine when a species has recovered and can be delisted; and 3) estimates of the resources necessary to achieve both the ultimate recovery of the species and the intermediate steps toward that goal.

Recovery plans are generally considered to be guidance documents that do not have the force of regulation but could have legal weight in supporting government conservation measures.

In order to uphold the ESA's goal of species recovery, fishery management councils need to consider the conservation actions identified in a recovery plan while developing fishery management measures.

The ESA requires a formal opportunity for public review and comment for all new and revised recovery plans, and input received during this period must be considered prior to completion and approval of the plan. This allows fishery management councils the ability to provide input into the recovery planning process.

Recovery plans have been published for the green turtle, leatherback turtle, hawksbill turtle, blue whale, humpback whale, North Atlantic right whale and roseate tern. Published plans for the loggerhead turtle and Kemp's ridley turtle are being revised. A draft joint plan exists for the fin and sei whale and plans are under development for the sperm whale and smalltooth sawfish.

#### Section 7: Consultation

To facilitate the Section 7 consultation process, the South Atlantic Council prepares a biological assessment to evaluate the likely effects of the proposed fishery action(s) on ESA-listed species or designated critical habitat(s) within the area of the proposed action(s). In preparing a biological assessment, all listed species occurring in the affected area, as well as the fishery as a whole, must be addressed. The biological assessment aids the consulting agency (NOAA Fisheries/USFWS) in determining what further action is required (i.e., to conduct an informal or formal consultation).

Consultations are concluded informally when proposed actions are "not likely to

adversely affect" endangered or threatened species or designated critical habitat. Formal consultations are required when proposed actions are "likely to adversely affect" ESA-listed species or designated critical habitat. A formal consultation requires preparation of a biological opinion and determines whether a proposed action is likely to jeopardize the continued existence of a listed species (jeopardy) or destroy or adversely modify critical habitat (adverse modification). If jeopardy or adverse modification is found, the consulting agency is required to suggest "reasonable and prudent alternatives" to the proposed action that reduce impacts and avoid jeopardy to listed species. "Reasonable and prudent alternatives" must be taken into account in order for the action to be carried out legally.

A formal consultation also determines the amount or extent of anticipated incidental take in an incidental take statement. The incidental take statement has associated "reasonable and prudent measures" to reduce and minimize take. Takes are illegal if the "reasonable and prudent measures" are not implemented.

The ESA requires the use of best available scientific and commercial data. If information is unavailable to determine the effect(s) of the action on ESA-listed species or designated critical habitat, the opinion should give "benefit of the doubt" to the species thereby minimizing the chance of concluding that the action will not have a negative effect, when, in fact, it will.

#### Candidate Species and Species of Concern

Candidates are species being considered by the Secretary (of Commerce or Interior) for listing as endangered or threatened but not yet subject to a proposed rule. NOAA Fisheries has also established a Species of Concern list that identifies species that, although not actively being considered for listing, are of biological concern. Species previously listed as candidates within the South Atlantic Council's area of jurisdiction have since been moved to the Species of Concern list and include:

|                  |                  |                       |                   |
|------------------|------------------|-----------------------|-------------------|
| Dusky shark      | Sand Tiger Shark | Night Tiger           | Atlantic sturgeon |
| Mangrove rivulus | Opposum pipefish | Key silverside        | Speckled hind     |
| Warsaw grouper   | Nassau grouper   | Atlantic White Marlin |                   |

There is no mandatory federal protection for candidate species or species of concern though voluntary protection of these species is urged. Efforts to promote the conservation of such species, if effective, may alleviate or eliminate existing threats thus perhaps avoiding a future need for listing.