

An Endangered Species Designation for the American Oyster?

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The Endangered Species Act of 1973 (16 U.S.C. §§ 1531-1544, December 28, 1973, as amended 1976-1982, 1984 and 1988) provides broad protection for species of invertebrates, fish, wildlife and plants that are listed as threatened or endangered in the US. or elsewhere. It can be reviewed at (<http://laws.fws.gov/lawsdigest/esact.html>).

Provisions are made for listing species, as well as for developing recovery plans and the designation of critical habitat for listed species (The Institute of Public Laws. University of New Mexico. (digitalrepository.unm.edu/nrj/vol49/iss1/2) At face value, listing the American oyster (*Crassostrea virginica*) as endangered may be of benefit to protecting our native oyster. Routinely, when a species is listed as endangered, it helps to heighten the public's appreciation of the organism, it places the plant or animal in the forefront of federal and state awareness for management of the resource and its associated habitat, and it allows for special protective measures to be implemented and enforced to attempt to reduce the decline and, hopefully, allow the threatened population to recover.

But what if the animal is not really endangered throughout its range? What if discrete areas have reduced numbers of animals while, over the full range of the organism, populations are relatively stable and actually may be gaining in numbers and distribution? How would a declaration of "endangered" affect oysters and oyster management in places other than Chesapeake Bay? Would oysters still be available for sales on the open market or even for consumption?

These are important questions and ones that have not been thoroughly considered with the recent proposal to designate our oyster as endangered. To answer these questions, let's look more closely at what happens when an animal, such as the American oyster, is classified as endangered. Much of this information has been abstracted from Ryan and Schuler (1998).

An endangered species is any species that is in danger of extinction throughout all or a significant portion of its range. By designating a species as endangered, it falls under the auspices of the Endangered Species Act (ESA). The regulations implemented by the ESA prohibit any person from harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing or collecting any listed threatened or endangered species.

This broad prohibition has been interpreted to prohibit even ordinary land use activities such as farming, forestry or site development, if the result of such activities would be significant habitat modification or degradation where it actually kills or injures wildlife by interfering with essential biological functions such as feeding, breeding or sheltering.

Any activity that impacts an endangered species in a negative manner is considered a "taking." Originally, harm was interpreted as actually killing or injuring wildlife, but more recently it has been interpreted to include actions that are "reasonably certain" to cause injury in the future (Gilliland 2002).

If the oyster were to become listed as endangered and if you were to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct, you would be guilty of a "take" on an endangered species and would be subjected to both civil and criminal penalties from \$25,000 to \$50,000 per violation.

Criminal penalties could include up to one year in prison (Gilliland 2002). That would be for each oyster that you harmed! Provisions are included in the amended ESA to allow for an "incidental taking" of listed species. For example, if the objective of listing the American oyster were to protect the population of oysters in Chesapeake Bay, any individual outside of the Bay area would be required to file with the Secretaries of Commerce and Interior for an incidental take of oysters to conduct their normal oyster farm business.

This is a very complicated process that includes the submission of a Habitat Conservation Plan (HCP). The HCP must include:

1. The impacts which are likely to result from the taking;
2. The steps the applicant will take to mitigate and minimize the impacts;
3. The funding that will be available to implement such steps;
4. What alternative actions to the taking the applicant has considered;
5. The reason why the alternatives are not being adopted; and
6. Other measures as the Secretary should require (Uram 1997).

The Secretary is authorized to issue an incidental takings permit only if they find that the applicant, to the maximum extent practicable, minimized and mitigated the impacts of the taking, that adequate funding for the plan will be provided, and that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild (Uram 1997).

In addition to protecting individual plants or animals, the ESA provides for protecting the habitat of the species in question. At the time of the listing, the National Oceanic and Atmospheric Administration (NOAA) and/or the US Fish and Wildlife Service (F&WS) is mandated to include a designation of critical habitat for the newly listed species. Unless there is not enough scientific information to make that determination, in which case, the federal agencies get an additional year to provide that information.

The designation of critical habitat includes:

1. The specific areas within the geographical area currently occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features
 - (i) essential to the conservation of the species and
 - (ii) that may require special management considerations or protection, and
2. Specific areas outside the geographical area occupied by a species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species. (Uram 1997)

As an oyster farmer, the designation of critical habitat for the American oyster can impact your operations. For example, all farming activities occurring in the navigable waters of the US are required to be permitted by the US Army Corps of Engineers. The designation of critical habitat for the oyster will insert a more thorough consultation with NOAA and F&WS during the federal review process, thereby lengthening an already long process. It is not uncommon to have the review process extended from months to years at the federal level once it has invoked an endangered species review (Spaulding et al. 2003).

This extended review will take place regardless of whether the endangered species is present in the farm area or not. Moreover, at the end of the consultation, the farmer may be given a list of conservation, preservation and mitigation measures to protect the species (to avoid or minimize adverse modification of the habitat) that could significantly alter the project footprint and size, or greatly increase the expense or reduce the value of the project. (Spaulding et al. 2003).

As a component to the Endangered Species Act, the United States implements international rules of protection through the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). CITES differs from the ESA in that it only focuses on the trade of endangered species rather than on protection of habitat and ecosystem health. As such, CITES oversight may be an important consideration for oyster farming if the American oyster were to be listed as endangered.

From a trade perspective, ESA/CITES provides for penalties to anyone who violates regulations pertaining to importing or exporting, taking, possessing, selling, delivering, carrying, transporting, or shipping after taking; participating in interstate or foreign commerce or any commercial activity of any endangered species of fish, wildlife or plants in violation of CITES (Ryan and Schuler 1998).

If you are exporting oysters out of the US, or possibly even across state boundaries, as part of your business, you must obtain permission to trade in the endangered species. That is:

1. the country that will be receiving the shipment must provide an import permit to the shipper,
2. this, in turn, triggers review from the originating country who in turn issues an export permit.

The US Fish and Wildlife Service's Office of Management Authority is the agency that currently issues CITES import permits. In general, they require written proof of permission to import the product into the host country to accompany the application for an import permit. Typical time for processing a "well-written" application is four to six months (WCS 2005).

The last point to consider with the listing of the American oyster as an endangered species is the level of jurisdiction for the management of the species. The ESA provides for the federal government to enter into cooperative agreements with individual states with respect to the management of endangered species. That is only if the Secretaries of Commerce and/or Interior deem an individual state's management program an adequate and active program for the conservation of endangered species, as determined by a list of criteria set forth in the Act.

Unless the state meets the federal ESA criteria, management of the American oyster resources throughout its range will be under the jurisdiction of NOAA Fisheries Service and/or US Fish and Wildlife Service. As a purveyor of fine oysters, these are important points for you to think about when deciding to support or reject the designation of the American oyster as an endangered species.

Regardless of whether you support or reject the proposal, you need to let your federal representatives know how you feel and how you would like them to act regarding the on-going deliberations.

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