Larval bluefin tuna. Photo by Jim Franks/Gulf Coast Research Laboratory

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Yesterday I wrote about the shortcomings of ESA consultation on the Deepwater Horizon and other offshore oil rigs. Today I take up the implications of the spill itself under the ESA.

At least one ESA lawsuit has already been filed, and at least partially resolved. The Animal Welfare Institute, Center for Biological Diversity, Turtle Island Restoration Network and Animal Legal Defense Fund filed a complaint on July 1, accusing BP and the Coast Guard of killing endangered and threatened sea turtles in the course of burning off oil slicks in the Gulf. This morning, the Christian Science Monitor reports that BP and the Coast Guard have agreed "to allow wildlife rescuers to pluck sea turtles out of corralled oil patches to keep them from being incinerated alive," and in return the environmental groups have withdrawn their request to enjoin all controlled burning. The Monitor also reports that due to bad weather controlled burns have been halted until at least Tuesday.

Another suit against BP may be filed in a few weeks. The ESA's citizen suit provision requires that citizen plaintiffs notify the United States and prospective defendants of their intent to sue at least 60 days before actually filing suit. On May 25, Defenders of Wildlife and the Southern Environmental Law Center sent BP a Notice of Intent to Sue based on "take" of listed species by the Gulf spill.

Section 9 of the ESA prohibits any take, broadly defined to include harming or harassing, of endangered animals without a permit. FWS and NMFS can narrow the take prohibition for threatened species, but they have never purported to authorize take by oil spill. The wildlife agencies can issue permits for "incidental take," take which "is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." BP has not applied for any incidental take permits covering its Gulf oil development. Take can also be effectively permitted through section 7 consultation. So long as the activity complies with the terms and conditions of an "Incidental Take Statement" in a Biological Opinion, it does not violate Section 9. MMS's Biological Opinion for the 2007-2012 leasing program in the Gulf did include an Incidental Take Statement, but that statement explicitly excluded take resulting

from oil spills from coverage:

> However, NMFS is not including an incidental take statement for the incidental take of listed species due to oil exposure. Incidental take, as defined at 50 CFR 402.02, refers only to takings that result from an otherwise lawful activity. The Clean Water Act (33 USC 1251 et seq.) as amended by the Oil Pollution Act of 1990 (33 USC 2701 et seq.) prohibits discharges of harmful quantities of oil, as defined at 40 CFR 110.3, into waters of the United States. Therefore, even though this biological opinion has considered the effects on listed species by oil spills that may result from the proposed action, those takings that would result from an unlawful activity (i.e., oil spills) are not specified in this Incidental Take Statement and have no protective coverage under section 7(o)(2) of the ESA.

It seems clear that BP has violated Section 9 of the ESA by causing an oil spill that has harmed (by oiling) and probably also harassed (by causing them to deviate from their usual behavior to avoid oil) listed species. It is not entirely clear to me, however, what relief Defenders and the Southern Environmental Law Center will seek. The ESA citizen suit provision allows only injunctive relief; citizen suits cannot force defendants to pay penalties. Surely a court could declare that BP is violating the ESA, and order the company to stop spilling oil or to clean up what it has already spilled. That won't do much good if BP is, as it claims, already doing all it can. Perhaps the plaintiffs seek a way to test those claims in court. Perhaps they seek some control over the way cleanup is conducted. Their notice of intent to sue does mention that the large amounts of dispersant BP has used may themselves cause ecological harm, and that the spill threatens 38 National Wildlife Refuges on the Gulf Coast. Perhaps, if the plaintiffs can persuade a judge that other BP rigs also present the risk of a harmful blowout, they could seek to enjoin some or all operations at those other rigs.

Although citizen plaintiffs can't seek sanctions for BP's take of listed species, the United States can. Attorney General Eric Holder has announced that the Department of Justice is reviewing its options and "will prosecute to the full extent any violations of the law." The ESA provides both civil and criminal sanctions, but the criminal provisions and the serious civil penalties apply only to "knowing" violations. University of Michigan law professor David Uhlmann, formerly the head

of the environmental crimes section at DoJ, explained in a New York Times op-ed that the government might be able to argue that the spill was knowing, even though unintentional:

> But given good evidence, the government could argue that the companies cut corners or deviated so much from standard industry practice that they knew a blowout could happen. Or, the government could argue that, even if the initial gusher involved only negligence (a misdemeanor under the Clean Water Act) each additional day represents a knowing violation. Both approaches are untested, because there have been so few oil spill cases — but the gulf disaster warrants trying aggressive strategies.

The spill will also have implications for ESA listing decisions, consultation on actions other than oil development, and recovery planning. The post-spill Gulf is a different world than it used to be, and ESA implementation will have to take that new world into account.

The most high-profile listing decision implicating the spill is the Center for Biological Diversity's petition to list the Atlantic bluefin tuna as endangered. Earlier this spring, the parties to the Convention on International Trade in Endangered Species rejected a proposal to ban international trade in bluefin. The species, which has been badly overfished, may well have already qualified for listing. But the Deepwater Horizon spill adds a new twist. The Gulf of Mexico is prime spawning grounds for the western Atlantic bluefin population, and the spill occurred at the worst time of year.

The spill may also affect review of the Center for Biological Diversity's pending petition to list 83 coral species, which FWS has found presented sufficient evidence to warrant a status review for 82 species (hat tip: ESA Blawg). And it could potentially require reconsideration of the decision last fall to delist the brown pelican. In early June, the New York Times reported that nearly 50 brown pelicans covered in oil had been brought to rescue centers in Louisiana over the course of just two days. Other species (perhaps the loggerhead turtle, whose eggs are going to be moved from Gulf Coast nests to the east coast of Florida) may be sufficiently hurt by the spill to require uplisting from threatened to endangered, and new species could qualify for listing. Recovery plans may need to be revised for a variety of gulf species.

Consultation will surely be affected, and not just consultation on oil development. Future consultation on any actions adversely affecting Gulf species harmed by the spill will have to take the spill’s impacts into account, and consultation on Gulf fisheries may need to be reopened in light of the spill. There will be less margin for error, which means that thanks to BP those other activities will now have to be more tightly controlled. I don’t suppose BP will volunteer to pay the new regulatory costs it has effectively imposed on other Gulf actors.