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Fish and Wildlife Service to Consider American Eel for Endangered Species List

In July of 2005, the U.S. Fish and Wildlife Service (“USFWS”) announced that it possessed substantial information indicating that the American eel should be listed under the Endangered Species Act (the “Act”). The USFWS will now conduct a 12-month study to determine if this listing is warranted. If the American eel is listed as threatened or endangered, significant new restrictions could be placed on hydroelectric operations, commercial fishing, and wastewater discharges in water bodies populated by the American eel.

The American eel begins its life hatching from an egg in the Sargasso Sea, east of Bermuda, and grows into a glass eel as it drifts up the Gulf Stream. Glass eels actively migrate toward fresh water, entering streams, rivers, and tributaries along the Atlantic coast as far north as Greenland. In Maine, the American eel is present on most rivers, and is particularly prominent in the Penobscot and Kennebec Rivers. After finding their way to fresh or brackish water, glass eels, also known as elvers, migrate upstream. Elvers grow into yellow eels and live in lakes, ponds, streams, and rivers for several years. After three to twenty-four years in fresh water, yellow eels mature into silver eels and begin a migration back to the Sargasso Sea.

The USFWS has found that the American eel is particularly threatened by commercial harvesting and hydropower turbines. Water contamination and loss of wetland habitat due to dams are also potential threats to the American eel. Through September 6, 2005, the USFWS is soliciting comments and data from the public regarding the American eel, threats to the species, and its habitat. After the public comment period is closed, the USFWS will undergo a 12-month review to determine if scientific and commercial data support listing the American eel as endangered.

If the data supports a listing, the USFWS will propose regulations for the eel’s protection, solicit opinions from scientific experts, and again allow public comment for sixty days. Within one year, the USFWS will either withdraw the listing or publish final regulations establishing the American eel as a threatened or endangered species.

If the American eel is listed as a threatened or endangered species, the USFWS will have the power to review and potentially veto any federal action, including the funding, permitting, and licensing of private activity, that could jeopardize the eel or its habitat. The USFWS will also designate the American eel’s “critical habitat” and is authorized to regulate any activity, either on public or private land, that may impair that habitat. In addition, private citizens and businesses are subject to criminal and civil penalties for any “taking” of American eels that is not authorized by USFWS. “Taking” is defined broadly to include the harming, killing, capturing, or sale of a threatened or endangered species, as well as modifying critical habitat that would impair the species’ feeding, breeding, sheltering, and recovery. The USFWS may issue incidental take permits to certain public or private projects under limited circumstances. Absent such permits, the taking of a threatened or endangered species can result in civil and/or criminal penalties.

Many states, including Maine, also provide additional protection for endangered species. Maine, for example, allows the regulated taking of land in extraordinary cases where a species is threatened.

Currently, the State of Maine regulates the harvesting of American eels. If the USFWS places the American eel on the Endangered Species List, a complete ban on harvesting is likely. Fishing

activities that incidentally harm American eels may also face additional regulations.

Particularly stringent requirements could be expected for the hydroelectric industry, as the petition to list the American eel identifies hydroelectric facilities as the major threat to the American eel. For example, all licenses and permits affecting the American eel and its habitat would be reviewed and, at a minimum, conditioned to protect the eel if it is listed. Specifically, since the American eel migrates primarily at night during the fall, state and federal licenses can be expected to require evening shutdowns of turbines. In addition, because eels have difficulty using fish ladders, special passages may have to be installed to help eels migrate safely. Dams used for purposes other than hydropower may also face regulation, as the petition argues that dams have significantly reduced the American eel's habitat.

Industries responsible for contaminant run-off or wastewater discharge may also face greater regulation if the American eel is listed as endangered or threatened. Eels are bottom-dwelling, long-lived, and rich in fat, making them particularly vulnerable to contamination. Studies have shown high concentrations of contaminants such as mercury, dioxin, PCBs, and DDT in American eels. Aquaculture chemicals and sprayed

mosquito insecticides have also been cited as potential threats to the American eel.

Although the potential listing of the American eel as an endangered or threatened species is at an early stage, the repercussions would be significant. The last species in Maine to be listed as endangered was the Atlantic salmon. This listing had a significant impact on industries involved in aquaculture, agriculture, and waste discharge, and spawned a significant amount of litigation, including lawsuits filed by private citizens as authorized under the Act.

Verrill Dana is one of Northern New England's leading law firms specializing in environmental and regulatory law. If you have questions about how a potential listing of the American eel could affect your business or wish to submit comments to USFWS, Verrill Dana can assist you. Verrill Dana's Environmental Law Group is an experienced team that provides clients throughout New England with proactive advice to successfully manage the full range of their environmental permitting, compliance, development and litigation needs. For more information, contact Sean Mahoney in our Portland, Maine office at smahoney@verrilldana.com or (207)774-4000.

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If you have any questions, please contact Sean Mahoney at smahoney@verrilldana.com or (207) 774-4000.

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