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ENDANGERED SPECIES

Trump's regulation-cutting order unlikely to limit delistings

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Published: Thursday, February 2, 2017



The order on "reducing regulation and controlling regulatory costs" could require agencies to make tricky estimates about the impact of protecting species like the Arctic bearded seal. Photo courtesy of the National Oceanic and Atmospheric Administration.

Endangered Species Act experts doubt that President Trump's executive order limiting regulations will prevent the government from issuing rules to remove animals or plants from the endangered and threatened species lists.

The **order** requires that "for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process" (*Greenwire*, Jan. 30).

While delistings are done via rules that impose some monitoring of recovered species, experts on the process predict that the president's Office of Management and Budget (OMB) will look favorably on such regulations when it drafts guidance for implementing the order.

"The decision to delist a species would likely be treated as a repeal of a regulation," predicted Jonathan Wood, a staff attorney at the Pacific Legal Foundation, a property rights advocacy group. "I think if anything, it will improve the incentives for the agencies to take

seriously their obligation to review species that are on the list and get those off that no longer belong."

PLF has frequently represented landowners and businesses in lawsuits against the Fish and Wildlife Service, which implements the ESA along with the National Marine Fisheries Service. Many of the group's cases seek to force the delisting of species that scientific reviews have found were incorrectly listed or that have recovered to the point where protections aren't needed anymore.

"I think this might give them a better incentive to follow through on what the science actually tells them to do," Wood said.

Interest groups that support strong enforcement of the ESA also expect delistings to be unimpeded by the order.

"The OMB will look the other way whenever it suits their purpose, so I don't expect this to affect delisting proposals," said Brett Hartl, government affairs director at the Center for Biological Diversity. "They'll just ignore the executive order and pretend that it doesn't exist."

CBD, which often sues the federal government on behalf of imperiled species, also won't be able to use Trump's regulations limit to prevent delistings.

"All executive orders say that they don't create any legal rights or privileges, so it's not as if we're going to go to court and challenge them," Hartl said.

Cost questions

It's less certain how the order will mesh with some of the legal requirements of the ESA.

The 1973 law, for example, prohibits the consideration of cost when making listing decisions and includes firm deadlines that in some cases require the issuance of regulations.

"This executive order is really aimed more at EPA rules and rules of other agencies that impose direct costs on businesses, permit requirements, standards and that sort of thing," said Pat Parenteau, a professor at the Vermont Law School. "The ESA rules, they're not like that. They may have indirect effects because they require a process. But it's really hard to me to quantify the costs of these rules."

Parenteau acknowledged that protections for imperiled species and their habitats can impose limits on some economic activities.

"But a lot of these costs are not readily calculable," he said. "It's all speculative."

He pointed to protections for Arctic bearded seals, which the American Petroleum Institute, the Alaska Oil and Gas Association and others unsuccessfully challenged in court last year ([*E&E News PM*](#), Oct. 24, 2016).

In determining the cost of listing the seals, Parenteau suggested that NMFS could have evaluated the amount of hard-to-access oil reserves believed to exist in their icy habitat.

"But then you have to ask the question, is there any market for the oil and gas today?" Parenteau said. With crude selling for less than \$60 per barrel, "the answer is no," he said.

Wood, however, is confident that OMB's guidance will set out a process for calculating the "real and significant" costs of listings.

He also thinks the order will significantly curtail the extent to which the services limit the harming or killing of species — a range of actions collectively referred to as "take" — and designate protected lands and waters as "critical habitat."

"Those are the decisions that impose very significant burdens on property owners and industry, where the law permits the type of consideration the executive order is requiring, and I think that's where you'll see the biggest impact," Wood said.

PLF and other pro-business groups have challenged a long-standing regulation that extends the prohibition on take from "endangered" species, which the agencies have determined are on the brink of extinction, to include those that are merely "threatened," meaning they could be on the brink of extinction in the foreseeable future.

"That's a prime candidate, if you will, for reducing the costs in order to allow the service to allow new regulations — perhaps less burdensome ones," he said.

Wood would like to see the services comply with the order by reining in critical habitat designations, as well.

They have "acknowledged that often critical habitat designations can have huge costs, particularly for species that migrate a great deal, so I think this might cause them to be more hesitant to designate fringe areas as critical habitat or impose excessively large habitat designations," he said. "Perhaps the area where it will have the most impact is on the services' decision to designate non-occupied areas as critical habitat."

The agencies have argued in many cases that protecting areas currently unsuitable for a given species is justifiable because of the ways climate change is expected to alter some habitats.

Deadlines drive listings

ESA experts also don't expect the order to prevent future listings.

The law establishes a clear process for concerned citizens to request protections for imperiled species and firm deadlines for the agencies to act upon those petitions.

Trump's two-for-one regulations standard "only applies to the extent permitted by law," Wood said. "So if an agency has a statutory deadline it has to meet and it has to issue regulations, this won't stop that."

At the same time, however, Wood noted that the Fish and Wildlife Service already is frequently in violation of the law.

"There's so many petitions out there, and they're often so complicated and so big that it's impossible to meet those deadlines," he said. "The executive order doesn't change anything about that."

Parenteau agreed that the text of the order shouldn't affect the listing process.

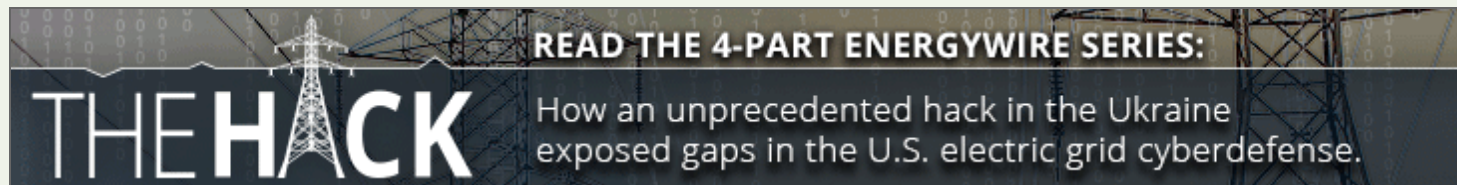
But he also noted that litigious conservation groups like CBD will be watching closely for any

evidence that regulatory costs or limits are affecting the agencies' decisions on whether to protect imperiled species.

"Money is pouring into their coffers for litigation," he said. "That's what they see for four years, is nonstop litigation over everything."

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