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Catching Our Balance: Opportunities For ESA Reform

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When Congress enacted the Endangered Species Act to protect and recover imperiled species and the ecosystems on which they depend, it emphasized the need to strike the proper balance between protecting species and allowing productive human activities. Widespread concern that this balance has been lost has sparked movement within the Trump administration and Congress to improve the ESA and its implementation by the U.S. Fish and Wildlife Service and National Marine Fisheries Service (together, the services). Many of these reform efforts are focused on ensuring earlier and increased involvement of states and other regulated entities and on improving the listing/delisting process to make certain that the extraordinary protections of the ESA are imposed, where warranted, and lifted, as appropriate.

In some respects, the push for improving ESA implementation continues the efforts of the Obama administration, which faced the challenging task of addressing numerous multispecies petitions to list hundreds of species as "threatened" or "endangered" at once (so-called mega-petitions) and corresponding lawsuits when the services inevitably failed to comply with statutory time frames to make listing decisions in response to those mega-petitions. In the last few years of President Barack Obama's tenure, the services took some incremental steps to improve the process by which species are listed by, for example, imposing more rigorous information requirements for listing petitions, limiting listing petitions to one species, and prioritizing petitions for critically imperiled species and species for which strong data are already available.

Now, the Trump administration has the opportunity — and seemingly, the appetite — to do more to refine the ESA program. The U.S. Department of the Interior's new 2018 to 2022 strategic plan and recent reports from the Department of the Interior and the U.S. Department of Commerce summarizing their plans to reduce regulatory burdens consistent with the president's directives, including Executive Order 13783 (Promoting Energy Independence and Economic Growth), have shown the services' focus on streamlining agency action under the ESA. The services are considering ways to modernize guidance and regulations governing ESA § 7 interagency consultation to create efficiencies and streamline the § 7 consultation process, which is often a significant hurdle for federal permitting. In addition, the FWS is reviewing and considering revisions to Obama-era ESA mitigation policies, which require stakeholders to improve, not just replace, impacted resources.

The services have also announced plans to build upon efforts of the Western Governors' Association to identify means to incentivize voluntary conservation, elevate the role of states in species conservation, and take other actions to facilitate conservation stewardship and reduce unnecessary burdens on states and industry. Consistent with this focus on state involvement, the FWS recently issued a memo providing a seat at the table for representatives from state fish and wildlife agencies and governors' offices to

participate in FWS species status assessments. This action gives the states more direct involvement in the process by which the service makes its listing determinations and provides a more formal process through which the service can obtain state data, research and expertise.

In addition, challenges have been brought to the 2016 rules that amended the criteria for designating critical habitat and the regulatory definition of "adverse modification" by expanding and complicating the designation of critical habitat and adverse modification determinations. Depending on the outcome of that litigation, the Trump administration may have occasion to adopt more narrowly tailored rules to protect critical habitat that is truly essential to the conservation of the species.

At the same time, the services have the opportunity to make important changes through individual listing/delisting decisions and critical habitat designations. Seeming to recognize that the ESA's extraordinary protections are appropriate only for species that are truly in danger of becoming extinct (or likely to become endangered within the foreseeable future), the administration has already taken action to reject listing petitions where listing was not supported by the science. For instance, in a recent FWS Federal Register notice, the FWS determined that listing was not warranted for 25 species, including the Pacific walrus, certain Nevada springsnail species and certain black-backed woodpecker populations, among others. In another recent notice, the FWS announced a finding that listing was not warranted for four species, including the white-tailed prairie dog.

In addition to determinations to list or not list certain species as "threatened" or "endangered," the services have the opportunity to delist and/or downlist, from "endangered" to "threatened," species when ESA protections have been successful in leading to the species' recovery. The FWS recently delisted the Yellowstone population of the grizzly bear because it determined the Yellowstone grizzly has recovered to the point that federal protections are no longer necessary and that overall management of the species should be returned to the states and tribes. States and other regulated stakeholders are beginning to push for delisting through petitions and lawsuits, including, for example, for the American burying beetle and the golden-cheeked warbler. Apart from responding to petitions from the public to delist or downlist a particular species, the service conducts status reviews of listed species every five years to ensure listed species have the appropriate level of protection under the act. Based on the recommendations of the five-year reviews, the services can propose to reclassify or delist a species through a separate rulemaking process. Currently, there are over 40 species for which the FWS has completed five-year status reviews recommending delisting or downlisting but has not yet taken final action to actually delist or reclassify the species.

At the same time as the services are pursuing these actions, which would go a long way to improve ESA implementation, there has been increased energy and focus on ESA reform in Congress. Numerous bills are pending in the House and Senate that would make key changes to the ESA, including, but not limited to, bills that would: require listing decisions to consider economic costs; adjust fees that can be awarded to lawyers in ESA-related litigation; increase requirements for coordination with states on listing and critical habitat determinations; and defer required findings on listing petitions where a conservation plan is already in place or being developed. While it may be challenging for Congress to pass such ESA reform efforts as stand-alone bills, some targeted changes could come through the appropriations process. The Senate's recent Interior Department and U.S. EPA appropriations bill, for example, would decrease the funding to list species and designate critical habitat from 2017 levels, prevent the FWS from using funds to list the greater sage-grouse or lesser prairie-chicken, and direct the service to move forward with its

recommendation to delist certain populations of the gray wolf. The House Interior Department appropriations bill has similar provisions.

With these key changes, the Trump administration and Congress could make significant progress to restore what many believe is the ESA's intended balance between the protection of species and economic growth.

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