

# Obama Plan to Cap Funding for Endangered Species Act Petitions Angers Litigants

By LAWRENCE HURLEY of  
Published: March 24, 2011

A Fish and Wildlife Service proposal that would give the agency more leeway to delay considering new endangered species petitions is getting a chilly reception from environmentalists and others involved in litigation on the issue.

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Under the plan discussed in a House Appropriations subcommittee hearing last week, the service has asked Congress to cap funding for the processing of new Endangered Species Act petitions (*E&E Daily*, March 17).

Such a move would have legal significance because the agency routinely struggles to meet court deadlines dealing with ESA issues. Lack of funding could be a formidable defense that would yield more time for juggling its caseload, the service maintains.

It is a move that lawyers that face off against the agency in court -- including those representing environmentalists, property owners and industry groups -- do not like. They say it gives the government more excuses not to act.

Under the ESA, the agency must make a determination within 90 days as to whether the petition is "substantial."

If that is the case, the agency then has 12 months from the petition date to issue a proposal to list the species.

The service has had ESA-related caps before, but not on the processing of petitions specifically. FWS has requested \$282 million for the administration of ESA in the coming year.

Gary Frazer, the assistant director for endangered species at FWS, said in an interview the agency has found other caps -- such as one on critical habitat designation -- useful in persuading courts that delays are outside of its control.

"This is a common-sense approach," he added.

Without the cap, the agency would be forced to use funds that could otherwise be spent on listing determinations, Frazer said.

Environmental groups that are usually pushing for more species to be listed are quick to criticize the proposal.

"The obvious solution to the purported lack of resources to address new listing petitions is to request sufficient resources from Congress to deal with its statutory obligations, not to ask Congress to cap the amount of money available to address the problem," said Brendan Cummings, an attorney with the Center for Biological Diversity.

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Daniel Rohlf, an environmental law professor at Lewis and Clark Law School in Portland, Ore., had similar reservations even though he expressed some sympathy for the agency's lack of resources and relative inability to choose which cases to assign more importance to.

"The agency needs some means of determining what actions it will prioritize, and for improving its listing process in general," Rohlf said. "However, I am not entirely comfortable with caps on money for petitions given the agency's very checkered record of dealing with its listing program in a lawful -- let alone strategic or sensible -- manner."

Groups that oppose new listings are equally dismissive of the government's proposal.

"The last thing the service needs is more excuses not to fulfill its statutorily mandated work," said Damien Schiff, an attorney with the Pacific Legal Foundation, which generally represents property owners who oppose ESA listings.

"If the service spent less time listing species that don't merit protection, or spent less time using money and manpower to protect species that should have been delisted long ago, then the service wouldn't need to run to Congress for a permission slip to get out of court," Schiff said.

On Capital Hill, the proposal is likely to attract the support of those who claim environmental groups have been gaming the system -- deliberately clogging up the courts so that the government cannot hit deadlines, which in turn means they can win attorneys fees ([Greenwire](#), March 3).

One of the lawmakers who has been most outspoken on the issue, Rep. Cynthia Lummis (R-Wyo.), said in a statement the cap could be used as a tool to "combat the lawsuit frenzy."

Whatever happens to the budget proposal, law professor Rohlf believes it is time for FWS to come up with a more detailed plan of action to deal with ESA petitions, but he conceded it could take a while.

"I'm technically overdue for spring break and outlining this sort of plan would take all day," he said.

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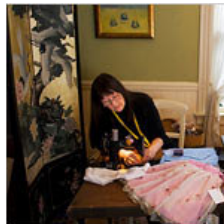
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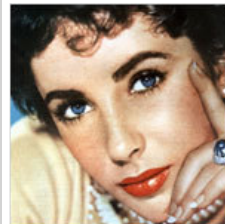
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