The Endangered Species Act has long been a lightning-rod for controversy. The last administration tried to significantly circumscribe the scope of the ESA in a wide range of ways (see, e.g, here). The Obama Administration up to this point in time has in general sharply contrasted with its predecessor in ESA management, including listing a lot more species and reversing some of the more controversial proposals of the last administration. (But there are exceptions, such as the fight over whether to delist grey wolves.)

But tucked away in the debates over the forthcoming 2012 budget is a proposal by the Obama Administration that might significantly change the implementation of the statute, and perhaps not for the better. It has to do with citizen petitions to list species for protection under the Act. FWS is asking Congress to cap the total amount of money that it can spend processing citizen petitions to list species, a step that might have major implications for how the ESA functions. (Free link here, additional info here). First, some background about how the ESA petition process works, and then I'll get into the merits of the proposal, based on some recent research that I conducted with a collaborator on the ESA petition process. The key point: This is probably a bad idea, because the petition process appears to, on average, have helped improve the ESA listing process.

More after the jump.

The ESA applies to species that are designated as threatened or endangered by the two lead agencies (Fish and Wildlife Service for terrestrial and freshwater species; NOAA for marine species). Given the significant regulatory impacts from the ESA, the decision to list a species can be quite controversial, and understandably so. When the ESA was enacted, Congress was concerned that political pressure might discourage the agencies from listing species that warranted protection, and it therefore included a fairly broad citizen petition process to open up the decisionmaking process. In summary, that process allows anyone to request that the agency list (or delist) a species for protection under the ESA; the agency is given strict deadlines to respond to the petition; anyone who is dissatisfied with the agency's response (either because the petition is rejected or because the agency misses the relevant deadlines) can sue the agency under the ESA's broad citizen suit provision. (Handy flowchart here).

The petition process has come under a great deal of controversy lately, as the number of petitions and the number of species petitioned for listing has soared. Organizations such as the Center for Biological Diversity have lodged petitions with FWS and NOAA to list hundreds of species (see, e.g., here) FWS in particular has a huge backlog of species that it believes warrant listing but for which funding is not available to complete the listing process

(see here for a list of the 260 candidate species that fall in this category)

One reason FWS has so many deserving species waiting for listing is that for years Congress (at FWS's request) has placed a cap on the amount of money that can be spent on finalizing listing decisions. FWS argues that this cap is needed to prevent the listing process (including the controversial process by which critical habitat is designated) from overwhelming the rest of its budget as a result of court orders requiring it to list species under the ESA.

FWS is now using the same argument in the context of petitions. (Note that the cap FWS is requesting is for expenditures to process petitions. This is different from (and precedes) the process by which FWS finalizes a decision to list species after it has considered whether the petition has identified a species that warrants listing.) Without the cap, FWS argues, the soaring number of petitions will both (a) allow lawsuits over FWS delays in processing petitions or denials of petitions to hijack the agency's decisionmaking process and (b) force the agency to divert resources from other high-priority management and regulatory tasks to handle petitions.

The first argument is one that has gotten a lot of traction: In the Greenwire story, the Republican Representative from Wyoming is quoted as arguing that the cap could restrain the "lawsuit frenzy" that she claims surrounds the ESA. Administration officials appear to be advancing the proposal because, in part, it would give the agency greater discretion in responding to petition decisions. Right now, if the agency misses a deadline to respond to a petition, it will pretty much automatically lose in court and be ordered by the court to respond within a short timeframe. The cap could give the agency a response to such lawsuits (at least after the cap is reached) that Congress has prohibited any further actions on petitions. Naturally, environmental groups are upset at the possibility of losing such an important legal hook on the agency; surprisingly, even conservative public interest legal groups are opposed (because they have used the ESA's petition process themselves to seek to delist some species).

The objections that petitions and citizen suits have improperly hijacked the agency's agenda would make sense if, in fact, the agency did a better job than petitioners or litigants of identifying species that warrant listing under the ESA. But as it turns out, that is not the case: In a project I co-authored with Prof. Brosi at Emory University, we studied hundreds of species that had been listed for protection under the ESA, comparing the species whose listing was initiated by a petition or which had been the subject of litigation with those that had not been the subject of a petition or litigation. The difference: Not much at all, and if anything, petitioned and litigated species were more deserving of protection under the Act.

It also appears pretty clear that litigation is offsetting political pressure on FWS not to list species that might interfere with major development projects.

So even if petitions and litigation over petitions is constraining the agency's decisionmaking process, it isn't making that decisionmaking any worse – in fact, it might be making it better. One hypothesis we have as to why this is the case is that the information about which species might be endangered and warrant protection is highly dispersed – only a few scientists ever study any individual species, so it's hard for any one agency to get the information about so many species itself. The petition process is a very useful way to collect that information.

What about the second argument, that the number of petitions is soaring so high that it may simply cause ESA implementation in particular, and FWS in general, to collapse under the weight of all of them? There may be merit to this argument to some extent, as petitions have reached unprecedented numbers. A cap might allow FWS to control its overall workload and manage this problem.

But there is a risk in doing so. Petitions take time and effort to prepare. Petitioners are unlikely to continue doing so if they think FWS will just blow them off. Thus, the strict deadlines in the ESA, and the ability to use citizen suits to challenge agency delays or denials, are an important element of encouraging people to prepare high-quality petitions. If the FWS cap is too draconian, you might see a dramatic drop in petitions, which as noted above would probably hurt the implementation of the ESA.

A cap therefore seems like it might cause some significant harm to the implementation of the ESA, and it might well be a bad idea. If FWS is going to do a cap because of the concern over the rise in the number of petitions, it should be careful to not set it too low. The cap should be designed more to prevent an explosion in the future in the number of petitions; it should not be set at a level that would effectively reduce the rate of petitions that FWS has been handling over the past several years.