

As expected, the Endangered Species Committee issued a blanket exemption, preventing any challenges to oil and gas drilling in the Gulf that threaten endangered species. Hegseth's [request](#) for the exemption is premised on the existing (but possibly insufficient) protections that the government is currently giving endangered species. Thus, it's not quite a license for Exxon to send out harpoon boats to kill off whales. It does, however, raise the suspicion that the government expected to lose in court, before in effect breaking the glass and pulling the emergency lever. We have only Pete Hegseth's word that those current protections are sufficient.

The Administration may claim that Hegseth has legally unlimited discretion in making national security findings, so that judicial review would be precluded. That would in effect give the Administration complete freedom to opt out of the Endangered Species Act whenever it wants, especially given how broadly Hegseth defines national security. It is hard to believe that Congress went to so much trouble to restrain the normal exemption process only to turn around and give the government a "get out of jail free" card. There is no need for courts to read the statute so broadly. For instance, it could be limited to exemptions for specific proposed actions (not a permanent exemption for all future actions), it could be limited to imminent security threats, or it could be limited to exemptions for military operations.

Assuming judicial review is available, the first question is whether Hegseth's exemption claim was within his authority – that is, whether the statute authorizes this kind of exemption. The second question is whether Hegseth was arbitrary and capricious in his decision to demand an exemption.

Hegseth's reasoning is quite interesting. Its premise is that current protections for species are enough, and he does not seek to disturb those. Instead, it is aimed to prevent any judicial challenge to the standards. It is those judicial challenges that Hegseth believes will endanger national security by creating a risk of interruption or significant interference with oil production, by creating a business risk that will deter oil industry investments, and by diverting the time and energy of bureaucrats in responding to the orders when they could be dashing off more permits. The order mentions the possibility of interference with military supply chains, but it places more emphasis on domestic and geopolitical reasons to expand U.S. oil production as much as possible. Notably, Hegseth did not consult the State Department, the National Security Council, or the CIA about these indirect ramifications.

One argument is that these broad and often quite indirect security implications go beyond what Congress meant the Defense Secretary to consider. They are so broad that virtually anything affecting the national economy, our competitiveness, etc., would be considered national security. At the very least, one might argue, the Secretary should have consulted agencies that actually have expertise in these areas.

Another argument is that most of these effects are so indirect and attenuated that they lack proximate cause. The argument is that leaving the Endangered Species Act in effect would create a risk of a future judicial action, which might interfere with oil production, which in turn would have other possible deleterious effects. None of this is imminent. Hegseth might just as well have waited to see if a court did take such an action. The other effect is even more indirect: Even if no court ever did issue such an order, Hegseth claims the mere future possibility frightens off some incremental amount of oil investment in the gulf, which then might cause some other effects on national security. This is, as we lawyers say, thin gruel.

When environmental effects are at issue, the Administration is very keen on demanding direct causation of concrete environmental harms. Here, however, the Administration is relying on speculative, indirect effects on an amorphously defined set of national interests. I think it would be reasonable to construe the term “threat” to require something more direct and less speculative than what Hegseth has given us.

If I were the oil companies, I wouldn’t get too comfortable with this exemption. Rather than preventing litigation, it is likely to lead to far more. And so far as I can see, there’s nothing to prevent a future Administration from repealing Hegseth’s national security finding with a stroke of the pen and with it the exemption. It might even be unconstitutional to make a finding on national security binding on all future Presidents. A future Administration could do more than just repeal this finding. If Hegseth’s freewheeling use of national security stands up in court, a future administration could well classify climate change as a national security threat and use it against the oil companies in other ways.