

ENDANGERED SPECIES

Top Interior official: More reg rewrites are on the way

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New Endangered Species Act regulations are in the works. The Mexican spotted owl, pictured here, is on the endangered species list. National Park Service

LAKE TAHOE, Calif. — Keep an eye out for more proposed reforms to the federal government's management of endangered species, a key architect of the Trump administration's changes to a landmark 1973 law told members of Congress, lobbyists and other stakeholders at a recent policy roundtable here.

"Our next round of regulations is going to deal with, No. 1, what is the definition of habitat" under the Endangered Species Act, said Karen Budd-Falen, the Interior Department's deputy solicitor for parks and wildlife.

The former Wyoming property rights attorney also said the administration will review the section of the law, known as Section 4(b)(2), that gives the Interior secretary flexibility to exclude areas from a critical habitat designation if the benefits of doing so outweigh the benefits of designation, provided the exclusion doesn't result in the extinction of the species.



Karen Budd-Falen. Budd-Falen Law Offices, LLC

The 4(b)(2) exemption allows consideration of economic costs, which has been subject to debate and varied interpretations.

But Budd-Falen said the current Interior "will continue to do an economic analysis" when determining critical habitat for species.

Her comments, which included a summary and defense of the department's first round of changes to the ESA unveiled last week, came during an event in Lake Tahoe sponsored by the Western Caucus Foundation, an arm of the Congressional Western Caucus.

"That was the most awesome thing to work on at the Department of Interior," Budd-Falen told the group, of her participation in drafting the reforms.

The administration's final rule makes significant changes to the law's implementation, including how it treats threatened and endangered species and critical habitat. The new rule also allows for an analysis of listings' economic impacts.

As it relates to critical habitat, the final rule adds a requirement that "at a minimum, an unoccupied area must have one or more of the physical or biological features essential to the conservation of the species in order to be considered as potential critical habitat," language based on a narrow 2018 Supreme Court ruling involving the dusky gopher frog ([Greenwire](#), Nov. 27, 2018).

However, "we note that we do not in the rule attempt to definitively resolve the full meaning of the term 'habitat,'" the Fish and Wildlife Service and NOAA wrote in the [section](#) of the August 2019 rule on designating critical habitat.

"The new regulations are going to define habitat," Budd-Falen said of the second wave of proposed changes to the ESA.

Budd-Falen told E&E News that she wasn't sure about the timeline of the next rollout.

"We were told get them done; they will obviously go through a public comment process," she said, noting that the entire rule-making process involves various agencies, including the Office of Management and Budget.

'Little Washington, D.C., bubble'

The first wave of changes the administration proposed to the ESA took nearly two years to complete.

Opponents, including environmental groups and many Democrats, have said the changes will gut the ESA and lead to nonscientific decisionmaking.

Supporters of the changes defend them as clarifying ambiguous language, simplifying a cumbersome and costly process, and providing more transparency for a complicated and controversial law ([E&E News PM](#), Aug. 12).

"It's so fascinating to see the press now from the little Washington, D.C., bubble about the Endangered Species Act regulations versus what we know to be the truth," said Budd-Falen, dismissing criticism over the changes.

"And if you read the press in the D.C. bubble, we have gutted the Endangered Species Act, and we don't care about species anymore. It just makes me laugh because their reality is not the same as the reality out here in the rest of the nation," said the Wyoming native and self-described "cowboy lawyer."

Budd-Falen said she and FWS Principal Deputy Director Margaret Everson are "really interested in working on collaborative conservation" with private landowners to help protect species on their property and work with the agency in mutually beneficial ways.

"There isn't any question that species are on private land, so we need to make it easier and simpler for private landowners to protect species instead of going out and hammering them with \$5,000-a-day fines and five years in prison if you take a species," she told the crowd. "So, let's make it easier to do these agreements with private landowners and with mineral companies and with oil and gas and with all these companies, so that landowners want to participate to protect endangered species instead of being completely afraid of an endangered species on their property."

After the event, Budd-Falen, who worked at Interior during the Reagan administration, told E&E News that the current political polarization in Washington, D.C., makes it hard for different constituencies to find common ground when it comes to land and species management.

"Now, for so many people, it's sacrilege if you're talking to the other side," she said. "And I just think that's not a good way to run things."

ESA legislative package

Congressional Western Caucus Chairman Paul Gosar (R-Ariz.) said at last week's meeting the group will introduce its first big legislative package of the year when Congress returns next month, and it will relate to the Endangered Species Act.

"This will have bipartisan support," the Republican said. "This is something we've done a lot of work on."

The caucus last summer unveiled a nine-bill bundle aimed at overhauling the ESA ([E&E Daily](#), July 13).

The upcoming package will contain similar measures, said Jeff Small, executive director of the Congressional Western Caucus and a senior adviser to Gosar.

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