

ENDANGERED SPECIES

Interior wordsmiths 'habitat' with eye on regulatory reach

Jennifer Yachnin, E&E News reporter • Published: Friday, December 27, 2019



The definition of "habitat" was a point of contention during a legal battle over protections for the dusky gopher frog. John Tupy/Fish and Wildlife Service

The Interior Department is moving to formally define "habitat" in the Endangered Species Act, part of an anticipated second wave of changes to the bedrock conservation law under the Trump administration.

According to a [notice](#) published Monday by the White House Office of Information and Regulatory Affairs, the addition to the ESA is undergoing interagency review.

Interior's Fish and Wildlife Service and the Commerce Department's NOAA Fisheries are overseeing the proposed revisions.

The issue became a point of contention during a legal battle over FWS plans to protect the dusky gopher frog in Louisiana and the rights of private landowners, including timber giant Weyerhaeuser Co.

Although the Supreme Court directed a lower court to examine the meaning of "habitat" in the ESA, the federal government and plaintiffs in the case reached a settlement and left unresolved questions over how "habitat" should be defined in the law ([Greenwire](#), July 8).

The Trump administration issued final rules amending the ESA earlier this year — including language requiring "critical habitat" to have "one or more of the physical or biological features essential to the conservation of the species" — but it did not address the broader habitat issue.

"The new regulations are going to define habitat," Interior Deputy Solicitor for Parks and Wildlife Karen Budd-Falen told E&E News at that time ([Greenwire](#), Aug. 22).

In that [final rule](#), however, FWS and NOAA Fisheries laid out similar requirements for future "habitat."

"The final rule has been modified in response to the decision to make clear that unoccupied habitat must be 'habitat,' by requiring reasonable certainty that at least one physical or biological feature essential to the conservation of the species is present," the agencies wrote.

The document continued: "While the [FWS and NOAA Fisheries] are considering further clarification of the meaning of habitat through separate rulemaking, we find that the [agencies'] and public's interests are served by clarifying the existing regulatory framework in this final rule without delay."

Environmental activists have raised concerns that too narrow a definition could impede efforts to protect endangered wildlife.

"It could have really big consequences depending on how the definition comes down," said Jacob Malcom, director of the Defenders of Wildlife Center for Conservation Innovation.

Malcom, who said he had not seen a draft of the proposed rule, noted that since its adoption in the early 1970s, the ESA has never had a specific standard for "habitat."

"Every listing has gotten its own evaluation," Malcom said, adding: "You know habitat when you see it."

He asserted that the new definition must be flexible enough to include "indirect areas" of habitat, such as watersheds where a species may not live but that significantly impacts its range. Malcom also said that any definition should address imminent shifts to habitat, including those caused by climate change.

"A definition of habitat has to consider where that habitat would be out to the horizon of the foreseeable future," he said.

Reporter Kellie Lunney contributed.

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