



Home is Where the Habitat is: Supreme Court Addresses Critical Habitat under the Endangered Species Act

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On November 27, 2018, in a unanimous decision, the Supreme Court held that only “habitat” of an endangered species can be designated as “critical habitat” under the [Endangered Species Act](#) (ESA). (Justice Kavanaugh did not participate in the decision.) The case, *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, involved the Fish and Wildlife Service’s (FWS’s or Service’s) decisions (1) to designate a 1,544-acre private property as critical habitat for the endangered [dusky gopher frog](#), and (2) not to exclude the property from its critical habitat designation. The Court remanded the case to the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) to determine whether the private property was “habitat” for the frog and if the FWS abused its discretion when it decided not to exclude the property from the critical habitat designation.

Although the Supreme Court did not define “habitat” under the ESA, its ruling is significant because it clarifies that, in order to be deemed “critical habitat,” an area must first meet the requirements to be deemed “habitat” for the endangered species. Further, the Court’s decision opens the door to judicial review of the FWS’s discretion not to exclude property from its “critical habitat” designations. This Sidebar explains the criteria for designating critical habitat under the ESA, reviews the critical habitat designation for the dusky gopher frog, and discusses the *Weyerhaeuser Co.* decision and the importance of the case moving forward.

Designating Critical Habitat under the ESA

Congress [enacted](#) the ESA to conserve endangered species and their habitats. For each species listed as threatened or endangered under the ESA, the Secretary of the Interior (through the FWS) must “[designate any habitat of such species which is then considered to be critical habitat.](#)” The ESA authorizes the FWS

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to designate **two types of critical habitat**: (1) specific areas within the geographical area occupied by the species, which contain the “physical or biological features essential to the conservation of the species” and may require special management protections (occupied habitat); and (2) areas outside the geographical areas occupied by the species if the Secretary determines that such unoccupied areas are “essential for the conservation of the species” (unoccupied habitat).

The ESA requires the FWS to base its **critical habitat designation** on the “best scientific data available” and consider the “economic impact” and other relevant impacts of the designation. FWS may exclude an area that would otherwise be included as critical habitat if the benefits of exclusion outweigh the benefits of designation, unless the exclusion would result in the extinction of the species.

Once an area is designated as critical habitat, **federal agencies** may not authorize, fund, or carry out actions that are likely to “result in the destruction or adverse modification” of critical habitat. If FWS determines that an agency action, such as issuing a permit, would harm critical habitat, the agency **must** terminate the action, implement an FWS-proposed action, or seek an exemption. A critical habitat designation does not directly affect private landowners. However if the development of their land requires a federal permit, authorization, funds, or other federal action, a critical habitat designation could affect their activities.

The Endangered Dusky Gopher Frog and its Critical Habitat

After **listing** the dusky gopher frog as an endangered species in 2001, the FWS designated four areas in Mississippi totaling 4,933 acres as **occupied critical habitat** in 2012. The Service concluded that these occupied areas possessed the **three features** that the Service considered “essential to the conservation” of the frog and required special protection: (1) ephemeral ponds (seasonally flooded and isolated from other water bodies) for breeding; (2) upland, open-canopy forest containing holes and burrows for dwelling; and (3) open-canopy forest that allows the frog to move between breeding and dwelling areas.

Because the FWS determined that the four designated areas in Mississippi would not be adequate to ensure the frog’s conservation, the Service also designated as **unoccupied critical habitat** 1,544 acres in St. Tammary Parish, Louisiana (Unit 1). The dusky gopher frog does not currently occupy the land in Unit 1 and according to the FWS, has not been seen in the unit since 1965. However, Unit 1 contains five ephemeral ponds suitable for the frog’s breeding. Although the closed-canopy timber plantation areas of Unit 1 does not contain the “essential physical or biological features of critical habitat,” the Service determined that an open-canopy forest could be restored “with reasonable effort.” The Service concluded that Unit 1 is essential for the conservation of the frogs because it provides important and rare breeding sites for recovery of the endangered frog.

The FWS also decided not to **exclude** Unit 1 from its critical habitat designation because the costs of designating the areas, including Unit 1, were not “disproportionate” to the conservation benefits.

Weyerhauser Co. v. U.S. Fish and Wildlife Service Decision

The Supreme Court’s decision in *Weyerhauser Co.* clarified two issues related to the designation of critical habitat under the ESA. First, the Supreme Court held that, as a threshold matter, the FWS must determine if an area is “**habitat**” before it may consider whether it is “critical habitat.” In this case, the plaintiffs challenged the critical habitat designation, arguing that Unit 1 could not be critical habitat for the dusky gopher frog because Unit 1 was not a habitat for the frog without the other essential habitat features such as open canopy areas. The **Fifth Circuit** rejected the argument that the definition of “critical habitat” contains any “habitability requirement.” The Fifth Circuit held that the FWS reasonably concluded that Unit 1 was essential for the conservation of the frog, deferring to the FWS’s interpretation of the term “essential” under the ESA.

On review, the Supreme Court disagreed with the Fifth Circuit, [reasoning](#) that “[a]ccording to the ordinary understanding of how adjectives work, . . . ‘critical habitat’ is the subset of ‘habitat’ that is ‘critical’ to the conservation of an endangered species.” In analyzing the ESA statutory language, the Court held that the ESA “does not authorize the Secretary [of the Interior] to designate the area as critical habitat unless it is also habitat for the species.” However, the Court noted that the ESA does not define “habitat.” Because the Fifth Circuit held that “critical habitat” was not limited to areas that qualified as habitat, the Court vacated the judgment and instructed the Fifth Circuit on remand to interpret the term “habitat” and assess whether Unit 1 qualified as “habitat” that was critical to the conservation of the dusky gopher frog.

Second, the Supreme Court [clarified](#) that the FWS’s decision not to exclude an area as critical habitat is judicially reviewable. The plaintiffs challenged the FWS’s decision not to exclude Unit 1 from the dusky gopher frog’s critical habitat, arguing that the Service had failed to weigh adequately the benefits of designating Unit 1 against the economic impact of the designation. The Fifth Circuit did not address this claim because it concluded the ESA provides the FWS with the discretion to decide not to exclude an area from critical habitat. Because the ESA provided no standard to review FWS’s discretionary decision not to exclude Unit 1, the Fifth Circuit held that it was not reviewable. The Supreme Court disagreed, holding that a challenge to FWS’s cost-benefit analysis is the “sort of claim that federal courts routinely assess when determining whether to set aside an agency decision as an abuse of discretion” under the [Administrative Procedure Act](#). The Court vacated the judgment and instructed the Fifth Circuit to consider whether the Service’s cost-benefit assessment and its decision to not exclude Unit 1 from the critical habitat designation was arbitrary, capricious, or an abuse of discretion in violation of federal rulemaking requirements (discussed in this [Report](#)).

Implications

While acknowledging that the ESA does not provide a “baseline definition of habitat,” the Supreme Court left the task to the lower court to interpret the term “habitat.” Without a statutory definition or guidance from the Court, the Fifth Circuit may defer to the FWS’s interpretation of “habitat” in light of its previous [decision](#) in this case that deferred to the Service’s interpretation of what is considered “essential” to the conservation of the endangered dusky gopher frog. The FWS has argued that “habitat” can include areas like Unit 1 that would require reasonable modifications to support a sustainable population of the endangered species.

A narrow interpretation of “habitat” by the court could potentially limit the government’s ability to designate areas as critical habitat and affect the conservation and recovery of an endangered species. For example, if Unit 1 is designated as critical habitat, the ESA requires federal agencies issuing permits for land development to consult with the FWS and, if necessary, prescribe conditions or changes to the projects to prevent destruction or adverse modification of the critical habitat. Without a critical habitat designation, federal agencies would not be required to initiate ESA consultations for Unit 1 land development and could not impose conservation measures identified through consultation.

Further, the Supreme Court’s ruling opens the door to future challenges to the FWS’s decision not to exclude areas from its critical habitat designations. Before *Weyerhauser Co.*, the Fifth Circuit and other lower courts that addressed this issue had held that the FWS’s decision not to exclude an area from critical habitat is not subject to judicial review.

While the case is remanded to the Fifth Circuit, the Supreme Court’s decision in *Weyerhauser Co.* could inform [congressional efforts](#) and debate on the definition of “habitat” under the ESA and how the FWS assesses costs and benefits of its critical habitat designations. In addition, the Trump Administration may finalize its [proposal](#) to narrow the scope of the FWS’s authority to designate unoccupied habitat by adding additional criteria. The [proposal](#), among other things, would allow the Secretary of the Interior to

designate unoccupied areas as critical habitat if the occupied habitat of the species at the time of listing is inadequate to ensure the conservation of the species or results in less efficient conservation of the species than habitat that includes unoccupied areas. Under the proposal, for an unoccupied area to be “essential” for the conservation of the species, the Secretary would first need to determine that there is a likelihood that the area would contribute to the conservation of the species.