



Putting the Habitat Back in Critical Habitat

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The U.S. Supreme Court recently clarified that only the habitat of an endangered species is eligible for designation as “critical habitat” under the Endangered Species Act. *Weyerhaeuser Co. v. United States Fish and Wildlife Service, et al.*, No. 17-71, 2018 U.S. LEXIS 6932, *15 - *16 (Nov. 27, 2018). Unoccupied areas may qualify, but the Secretary of Interior is not authorized to designate an area as “critical habitat” unless it is also habitat for the endangered species. The Court also confirmed that the Service’s decision not to exclude property from a critical habitat designation is judicially reviewable.

The controversy in *Weyerhaeuser* arose from the Fish and Wildlife Service’s inclusion of a 1,544-acre site as critical habitat for the dusky gopher frog. The frog has not been seen at the site for approximately 45 years and the site lacks the open-canopy forest in which the frog lives, but it has other features considered essential to conservation of the frog. The Service designated the site as critical habitat to guard against the risk that the frog’s small existing range may be affected by extreme weather, disease, or other local events.

The Act defines critical habitat to include “specific areas within the geographical area occupied by the species...on which are found those physical or biological features (I) essential to the conservation of the species; and (II) which may require special management considerations or protection.” Critical habitat also includes “specific areas outside the geographical area occupied by the species...upon a determination by the Secretary that such areas are essential for conservation of the species.”

The property owners argued that the site cannot be critical habitat because the frog could not survive there. The Service argued that habitat includes areas like the site that would require some degree of modification to support a sustainable population of a given species.

In addition, one property owner challenged the Secretary’s economic analysis and resulting decision not to exclude the site from designation. The Service must consider the economic impact of a critical habitat designation and may exclude any area if the benefits of exclusion outweigh the benefits of inclusion. The designation of the site substantially decreased its market value by calling future development into question.

The Supreme Court remanded the case to the Fifth Circuit to consider the meaning of the term habitat, assess the Service’s administrative findings with respect to the site, and if necessary, determine whether the Service’s cost-benefit analysis was flawed in a way that rendered its decision arbitrary and capricious or an abuse of discretion.

For more information regarding this case, please contact [Nicole Blevins](#).