

## Supreme Court Limits Authority to Designate Critical Habitat Under Endangered Species Act

In a unanimous decision with immediate repercussions for the administration of the Endangered Species Act (ESA), the U.S. Supreme Court held that an area is eligible for designation as critical habitat under the ESA only if it is also "habitat" for the species within the meaning of the statute. And federal courts can review the decision not to exclude areas from critical habitat based on economic impacts and other factors. [Weyerhaeuser Co. v. U.S. Fish and Wildlife Service](#), No. 17-71 (Nov. 27, 2018). This decision nonetheless leaves significant merits claims as well as a question of statutory interpretation to the appeals court on remand.

### Critical Habitat Designation Under the ESA

The U.S. Fish and Wildlife Service (Service), upon listing a species as endangered, must also designate its "critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i). The ESA defines critical habitat to include: (1) areas occupied by the species that contain "physical or biological features . . . essential to the conservation of the species and . . . which may require special management considerations or protection," and (2) areas not occupied by the species but determined by the Service to be "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A).

As part of its proposed critical habitat designation, the Service must also consider the costs of that designation. 15 U.S.C. § 1533(b)(2). Unless it would result in the extinction of the species, the Service is authorized to exclude from critical habitat an area where the benefits of excluding that area outweigh the benefits of designation. *Id.*

### The Dusky Gopher Frog and the Instant Litigation

The dusky gopher frog once lived in longleaf pine forests throughout Alabama, Louisiana and Mississippi. Due in large part to the loss of these forests, the frog's wild population dwindled by 2001 to a group of 100 individuals at a single pond in southern Mississippi. That year, the Service listed the frog as endangered.

In 2012, the Service designated nearly 6,500 acres in Louisiana and Mississippi as dusky gopher frog critical habitat. This included all four areas known by the Service to host dusky gopher frog populations. The Service found these areas possessed three features "essential to the conservation" of the frog: ephemeral ponds for breeding; upland open-canopy forest with holes and burrows to live in; and open-canopy forest connecting the two.

The critical habitat designation also included 1,544 acres of closed-canopy timber plantation (dubbed "Unit 1") not occupied by the frog in several decades. According to the Service, Unit 1 was essential for the conservation of the species and met the definition of unoccupied critical habitat by virtue of its high-quality ephemeral breeding ponds and proximity to existing frog populations. And although much of Unit 1 lacked the type of open-canopy forest required by the frog, the Service found that such forest habitat could be restored there "with reasonable effort."

As required by the ESA, the Service commissioned a report on the probable economic impact of its proposed critical habitat designation, which concluded that designating Unit 1 could cost private landowners up to \$33.9 million in lost development value. The Service nonetheless determined the conservation benefits of designating

Unit 1 outweighed the benefits of excluding Unit 1 from critical habitat.

Private property owners within Unit 1 challenged the critical habitat designation, which both the U.S. District Court for the Eastern District of Louisiana and the U.S. Court of Appeals for the Fifth Circuit upheld. The Supreme Court granted certiorari to consider: (1) whether "critical habitat" must also be habitat, and (2) whether a federal court may review an agency decision not to exclude a certain area from critical habitat because of the economic impact of such a designation. The Court's 8-0 decision resolves these issues in the affirmative.

### Critical Habitat Must Be Habitat

First, the Court ruled that only habitat of an endangered species is eligible for designation as critical habitat: "According to the ordinary understanding of how adjectives work, 'critical habitat' must also be 'habitat.' Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality. It follows that 'critical habitat' is the subset of 'habitat' that is 'critical' to the conservation of an endangered species." Slip Op. at 8. The term "habitat," however, is not defined in the ESA or regulations.

The Court remanded the case for consideration of two disputed issues: (1) whether an endangered species' habitat can include areas that would require some modifications to support the species, and (2) whether the dusky gopher frog could survive in Unit 1 without any modifications to the existing features.

### An Agency Decision Not to Exclude Area From Critical Habitat Is Reviewable

The Service argued that a decision not to exclude an area from critical habitat is wholly discretionary and therefore unreviewable. The Court disagreed, finding the decision reviewable for abuse of discretion.

The Court emphasized the strong presumption in favor of judicial review of administrative action and concluded that the ESA provisions regarding decisions not to exclude an area from critical habitat were not drawn so narrowly as to deny the court a meaningful standard to apply. Rather, this claim—that the agency did not appropriately consider all of the relevant factors that the ESA sets forth in guiding the Service's critical habitat exclusion decisions—is of the sort that federal courts "routinely assess" for abuse of agency discretion. Slip Op. at 14.

Because the Fifth Circuit found this issue unreviewable, it did not decide whether the Service's assessment of the costs and benefits of critical habitat designation was flawed in a way that rendered the decision to exclude Unit 1 arbitrary, capricious or an abuse of discretion. The Supreme Court remanded for consideration of this question.

### Conclusion

The Supreme Court's ruling is a significant victory for property owners and developers, including companies in the timber products and energy industries. The decision limits the areas that can be designated as critical habitat by requiring the Service to first find that an area is "habitat." In practice, the extent of this limitation will depend on how courts interpret the term "habitat"—the major question for the Fifth Circuit on remand is whether a species' habitat can include areas that require modification to be habitable. The Court's decision is also an invitation for the Service to promulgate a new regulation to define the term "habitat."

The ruling also opens the door for private parties to challenge the Service's cost-benefit analyses underlying critical habitat designations. While this will likely lead to more litigation over critical habitat designations, review for abuse of discretion is highly deferential to an agency's decision.

The Supreme Court's decision comes on the heels of several recent agency-level attempts to limit the scope and regulatory burden of the ESA. In April, the Service issued a [guidance memorandum](#) that narrowed the

circumstances under which the Service would consider an incidental take permit for habitat modification appropriate. And in July, the Service proposed [significant revisions to its ESA regulations](#) that would, among other things, limit the Service's ability to designate unoccupied areas as critical habitat.

© 2018 Perkins Coie LLP

## Authors



### [Marc R. Bruner](#)

Partner

[MBruner@perkinscoie.com](mailto:MBruner@perkinscoie.com) [415.344.7171](tel:415.344.7171)



### [Laura G. Zagar](#)

Partner

[LZagar@perkinscoie.com](mailto:LZagar@perkinscoie.com) [415.344.7198](tel:415.344.7198)



### [Christian Termyn](#)

Counsel

[CTermyn@perkinscoie.com](mailto:CTermyn@perkinscoie.com) [415.344.7018](tel:415.344.7018)

## Explore more in

[Environment, Energy & Resources](#) [Energy Infrastructure & Clean Technology](#) [Infrastructure Development](#)  
[Land Use & Development](#) [Forest Products](#) [Oil & Gas](#) [Mining](#)

## **Related insights**

Update

**[‘Tis the Season... for Cybercriminals: A Holiday Reminder for Retailers](#)**

Update

**[Employers and Immigration Under Trump: What You Need To Know](#)**