Unanimous Supreme Court: "Critical Habitat" Under Endangered Species Act Must Be Habitat

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The United States Supreme Court issued a decision last week in *Weyerhaeuser Co. v. USFWS*, addressing whether the Endangered Species Act allows for the government to designate an area to be "critical habitat" when it is not currently suitable for the particular species to reside. [Read Opinion here.]

Factual Background

In 2001, the dusky gopher frog was listed as endangered by the US Fish and Wildlife Service (USFWS). This frog historically had been found along the coast of Alabama, Louisiana, and Mississippi in the forested areas. However, at the time of listing,

there were only 100 frogs living in one pond in southern Mississippi. In 2010, the Secretary designated critical habitat for the frog, including a 1,544-acre area in Louisiana, referred to as "Unit I."

It was undisputed that at the time of the designation, Unit I did not have any dusky gopher frogs present. In fact, there had been no such frogs on the site since 1965. In 2010, a closed-canopy timber plantation–which is not a viable place for the frogs to survive–was located on the property. The Secretary, however, determined that this area retained the requisite breeding ponds, could be returned to open-canopy forest with reasonable effort, and was some distance from the other areas designated (which the government desired in case of any extreme weather or outbreak of infection disease near the current location of the frogs).

As part of the designation, the government conducted a required economic impact study. The land was owned partially by a timber company and partially by a family, who leased their portion out to said timber company. While the critical habitat designation would not affect the timber production, the owners had invested in future plans to develop the site. The critical habitat designation certainly could impact such plans if federal permits would be required for such development. For example, if a Clean Water Act dredge and fill permit were required before filling any wetlands on the land, the US Army Corps of Engineers (COE) could not issue such permit without consulting first with the USFWS. Estimates showed that if the USFWS requested the COE to deny the permits all together, this would cost the landowners approximately $33.9 million. This, the USFWS found, was not disproportionate to the benefit of designation, and announced it would not exclude the Unit I from the designated critical habitat.

Applicable Law

Under the Endangered Species Act, when a species is listed as endangered, the Secretary of the Interior designates a "critical habitat" for that species. The critical habitat is defined as: (i) the 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 protections; and (ii) specific areas outside the geographical area occupied by the species…upon a determination by the Secretary that such areas are

essential for the conservation of the species." The statute does allow for the Secretary to exclude an area that falls under this definition, if he determines the benefits of the exclusion outweigh the benefits of the designation, so long as the exclusion would not result in the extinction of the species.

The result of a critical habitat designation is that the federal government may not take any activities or facilitate private activities without ensuring the action is not likely to adversely affect the habitat.

Litigation

In this case, Louisiana landowners whose property was designated as critical habitat filed suit. Specifically, the landowners argued that their land was not "habitat" at all, because the frog could not currently live on the property given the conditions. For the frog to live on the property, the timber plantation would have to be removed and replaced with open-canopy longleaf pine forests around the existing ponds. Further, the landowners argued that even if the property were to qualify as critical habitat, the Secretary should have excluded their property from the critical habitat designation because the economic benefits of exclusion outweigh the economic benefits of designation.

The trial court upheld the designation, finding that because the land met the ESA definition of a critical habitat–because the USFWS deemed the land essential for the conservation of the species–the designation was proper. The court also rejected the landowners' arguments related to the economic balancing of interests.

The US Court of Appeals for the Fifth Circuit affirmed the trial court decision. The court stated that a critical habitat contained no "habitability requirement." Further, the court determined that the USFWS decision not to exclude the habitat under the economic benefit analysis was agency discretion and not reviewable by a court. The court denied hearing en banc, but a number of judges dissented, saying that in order to be critical habitat, the land first had to actually be habitat. The dissenting judges also stated that the USFWS decision not to exclude Unit I could be reviewed for abuse of discretion.

The landowners sought review by the United States Supreme Court. The Supreme Court agreed to address two particular questions: (1) Whether "critical habitat"

under the ESA 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 designation.

Opinion

Justice Roberts wrote the opinion for the Court, ruling 8-0 (Justice Kavanaugh did not participate) to reverse and remand. In summary, the court determined the Court of Appeals was incorrect in its determination that critical habit was not required to be habitat and in its determination that the economic analysis determination was not reviewable.

First, the court looked at the meaning of the phrase "critical habitat." Offering a bit of a grammar lesson, Justice Roberts noted that in order to be critical habitat, an area must first be habitat. In looking to the language of the ESA, the Court noted that the provision requiring such designation states that the Secretary must "designate any habitat of such species which is then considered to be critical habitat." Thus, under the ESA only the habitat of a species is eligible for the designation a critical habitat. The court reasoned that the ESA definition of critical habitat explains what makes the habitat critical, not what makes it habitat. Thus, the term "habitat" is undefined under the Act.

The landowners argue that in order to be habitat, the species must be able to currently survive on the property. The USFWS argues that habitat can include areas where, with some modification, the species could be supported, even if that may not currently be the case.

Because the appellate level court ruled that critical habitat need not be habitat, the Supreme Court reversed and remanded the case to the Court of Appeals to consider whether Unit I qualifies as habitat.

Second, the Court addressed the question of whether judicial review of the economic impact consideration was proper. The USFWS argued that the economic impact analysis and decision was "committed to agency discretion by law" and, therefore, not reviewable by a court. The Court noted that there have been few cases in which decisions have been deemed "committed to agency discretion" and those did not involve agency orders affecting private parties. Instead, the

Secretary's determination of whether to exclude an area based on economic analysis is reviewable for abuse of discretion. The Court explained that because the ESA requires the Secretary to consider the economic impact and benefits prior to making an exclusion decision, the statute itself allows for a standard by which a court could review the Secretary's action.

Again, because the lower court did not review the Secretary's decision, the Supreme Court remanded the case to determine whether the analysis and decision not to exclude Unit I was arbitrary, capricious, or an abuse of discretion.

Take Away Points

This case does provide at least some limitation on the scope of the critical habitat designation under the ESA. We now know that in order to be critical habitat, land must first be habitat. Exactly what that limitation is remains to be seen and will depend on how the lower court makes a ruling based on the facts in this case. We also know that landowners who may disagree with the Secretary's economic analysis and exclusion determination do have a right to seek judicial review.