In *Weyerhaeuser Company v. U.S. Fish and Wildlife Service* the Supreme Court will decide whether the “critical habitat” designation under the Endangered Species Act (ESA) may include land currently uninhabitable for the species in question. The Court will also decide whether a court may review the Service’s economic impact analysis.

Alabama and 17 other states filed an *amicus brief* asking the Supreme Court to review this case because: “Critical habitat determinations have serious consequences for the economic and ecological interests of the States. Designations of critical habitat that go beyond what the statute allows cost jobs and tax revenue, while the States’ efforts to comply with these designations often require the expenditure of taxpayer funds.”

Per the ESA, the U.S. Fish and Wildlife Service (Service) designated land in Louisiana owned by the Weyerhaeuser Company a “critical habitat” for the dusky gopher frog. The Weyerhaeuser Company holds a timber lease on all of the land through 2043.

Only about 100 adult dusky gopher frogs are known to exist in the wild. Historically, the frog was found in parts of Louisiana, Mississippi, and Alabama. Today, the frog exists only in Mississippi.

To designate unoccupied areas a “critical habitat,” the Service must determine that they are “essential for the conservation of the species.”

The Weyerhaeuser Company sued the Service challenging the designation of its land. The company claims that the land in question is currently “uninhabitable” by the frog “barring a radical change in the land’s use by its private owners.”

The Fifth Circuit ruled in favor of the Service concluding the definition of “critical habitat” includes no habitability requirement and no requirement the frog can live on the land in the foreseeable future. Moreover, the court was concerned “private landowners could trump the Service’s scientific determination that unoccupied habitat is essential for the conservation of a species so long as they declare that they are not currently willing to modify habitat to make it habitable and that they will not be willing to make modifications in the foreseeable future.”

The ESA mandates that the Service consider the economic impact of designating a “critical habitat.” The Service may exclude an area based on a cost-benefit analysis as long as the species won’t become extinct.

Here the Service concluded the economic impacts on the land “are not disproportionate.” The Weyerhaeuser Company claims the potential loss of development value in the land is up to $33.9 million over twenty years. It also claims because the land isn’t currently habitable by the dusky gopher frog it provides no benefit.

The Fifth Circuit agreed with the Service that once it has fulfilled its statutory obligation to consider
economic impacts, a decision to not exclude an area is discretionary and not reviewable in court. “[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for ‘abuse of discretion.’”

By: Monday, February 5, 2018 at 03:53 PM
Tags: Endangered Species Act, Supreme Court, critical habitat, dusky gopher frog, federal agency economic analysis, Policy Area, Environment, Conservation

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