In a decision difficult to understand without context the Supreme Court held that “critical habitat” under the Endangered Species Act (ESA) must also be habitat. In *Weyerhaeuser Co. v. United State Fish and Wildlife Service* (2) the Court also held a federal court may review an agency decision not to exclude an area from critical habitat because of the economic impact. The State and Local Legal Center (SLLC) filed an *amicus* brief on the latter issue arguing in favor of the result the Court reached.

The United State Fish and Wildlife Service (Service) listed the dusky gopher frog as an endangered species. It designated as its “critical habitat” a site called Unit 1 in Louisiana owned or leased by Weyerhaeuser Company, a timber company. The frog hasn’t been seen at this location since 1965. As of today Unit 1 has all of the features the frog needs to survive except “open-canopy forests,” which the Services claims can be restored with “reasonable effort.”

Weyerhaeuser argued Unit 1 could not be a “critical habitat” for the frog because it could not survive without an open-canopy forests. The Fifth Circuit disagreed holding that the definition of critical habitat contains no “habitability requirement.”

The Supreme Court held unanimously that “critical habitat” must be habitat. The ESA states that when the Secretary lists a species as endangered he or she must also designate any habitat of such species which is then considered to be critical habitat. According to the Court: “[o]nly the ‘habitat’ of the endangered species is eligible for designation as critical habitat. Even if an area otherwise meets the statutory definition of unoccupied critical habitat because the Secretary finds the area essential for the conservation of the species [the statute] does not authorize the Secretary to designate the area as critical habitat unless it is also habitat for the species.”

The service argued that habitat includes areas like Unit 1 one which “require some degree of modification to support a sustainable population of a given species.” The Supreme Court sent this case back to the lower court to “interpret the term ‘habitat.’”

The ESA requires the Secretary to consider the economic impact of specifying an area as a critical habitat and authorizes the Secretary to “exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.” Weyerhaeuser Company claims the Service failed to fully account for the economic impact of designating Unit 1. The lower court refused to review the Service’s decision-making process.

The Supreme Court concluded it is reviewable. It “involves the sort of routine dispute that federal courts regularly review: An agency issues an order affecting the rights of a private party, and the private party objects that the agency did not properly justify its determination under a standard set forth in the statute.”

The SLLC *amicus* brief argued the Court should hold that judicial review is possible in this case.
Without it the Service has no incentive to listen to the expertise of state and local government officials “who are experts in the land-use issues that exclusion decisions most affect.”

Bryan K. Weir, Thomas R. McCarthy, and J. Michael Connolly of Consovoy McCarthy Park, and the Antonin Scalia Law School Supreme Court Clinic, wrote the SLLC amicus brief which was joined by the National Conference of State Legislatures [4], the Council of State Governments [5], the National Association of Counties [6], the National League of Cities [7], the United States Conference of Mayors [8], the International City/County Management Association [9], and the International Municipal Lawyers Association [10].

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