

**IS THE ENDANGERED SPECIES ACT ENDANGERED? RECENT DEVELOPMENTS &  
THREATS  
2018 TULANE ENVIRONMENTAL LAW SUMMIT**

The Endangered Species Act, oft-described as the "pit bull" of environmental law, is under siege once more, and under review both in the Supreme Court and the Congress. These materials background the high court case which happens to arise from this region, and proposals for ESA "reform" on Capitol Hill. There is never a dull moment for this law, which has proven instrumental in reconciling public and private development to the most at-risk species on earth.

**Sources And Layout**

**I. ESA Background & History**

Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 277-79 (1993)

**II. ESA Reform**

Rachel Schadeegg, *Senate holds hearing on Endangered Species Act Reform*, The Wildlife Society, Feb. 24, 2017, <http://wildlife.org/senate-holds-hearing-on-endangered-species-act-reform/>.

**III. ESA In the Courts**

*Weyerhaeuser Co. v. U.S. Fish and Wildlife Services*, No. 14-31008, 1-5 (5th Cir. 2016)

Holly Doremus, *When is unoccupied habitat "critical"?*, LEGAL PLANET, Jan. 24, 2018, <http://legal-planet.org/2018/01/24/when-is-unoccupied-habitat-critical/>.

# HEINONLINE

Citation:

Oliver A. Houck, The Endangered Species Act and Its  
Implementation by the U.S. Departments of Interior and  
Commerce, 64 U. Colo. L. Rev. 277 (1993)

Provided by:

Tulane Law Library

Content downloaded/printed from [HeinOnline](http://heinonline.org)

Tue Mar 6 10:58:21 2018

- Your use of this HeinOnline PDF indicates your acceptance  
of HeinOnline's Terms and Conditions of the license  
agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from  
uncorrected OCR text.



Use QR Code reader to send PDF to  
your smartphone or tablet device

UNIVERSITY OF  
**COLORADO LAW REVIEW**

*Volume 64, Number 2*

1993

**THE ENDANGERED SPECIES ACT  
AND ITS IMPLEMENTATION BY THE U.S.  
DEPARTMENTS OF INTERIOR AND  
COMMERCE**

OLIVER A. HOUCK\*

Introduction.....	278
I. Listing .....	280
a. A brief history of listing.....	281
b. "Warranted but precluded" and "management" exceptions .....	285
c. The bottleneck .....	292
II. Critical Habitat .....	296
a. The definition of critical habitat .....	298
b. The designation of critical habitat .....	301
c. Does it make a difference?.....	307
III. Consultation and Jeopardy .....	315
a. No jeopardy and alternatives.....	317
b. Jeopardy and regulatory limitations.....	321
c. Jeopardy, conservation, and takings .....	326
IV. The Exemption Process.....	329
a. The process and its consultation threshold .....	330
b. Consultation and the Northern Spotted Owl ...	333
c. The exemption proceedings and the Owl.....	338
V. Recovery Plans.....	344
VI. Private Takings and Habitat Conservation Planning.....	351
Conclusion .....	358

---

\* Professor of Law, Tulane Law School. The research and assistance of K. Douglas Lee, '92, Bradley Evens, '93, Michael Hoffman, '94, Jerry Lobrano, '93, Malcom Pipes, '93, James Siemens, '93, and Ruth Walker, '93, is acknowledged with gratitude.

## INTRODUCTION

"The Endangered Species Act was intended as a shield for species against the effects of major construction projects like highways and dams, not a sword aimed at the jobs, families and communities of entire regions like the Northwest," Mr. Bush said. "It's time to put people ahead of owls."

...  
... Mr. Bush assailed the act as a "broken" law that he pledged "will not stand."<sup>1</sup>

The Endangered Species Act (ESA),<sup>2</sup> America's most controversial environmental law, may also be its most misunderstood. It will be reviewed, once again,<sup>3</sup> for reauthorization in 1993, on the widespread reputation that its provisions are inflexible and stringently applied.<sup>4</sup> The facts are otherwise.

This is a study of the Act's four major provisions that restrain federal and private actions from jeopardizing threatened and endangered species: Sections 4, 7, 9, and 10.<sup>5</sup> These sections require, in language remarkably plain for federal environmental legislation, that endangered species be identified, that their essential habitat be designated, that federal agencies not jeopardize these species or adversely modify their habitat, that federal actions likely to jeopardize be exempted only in extraordinary circumstances, that plans be prepared and implemented for species recovery, and that private parties not harm these species without undertaking remedial planning. Each of these sections is a stage in the process. Each is described in language that has been clarified and strengthened over twenty years of congressional review and amendment.<sup>6</sup> Together,

---

1. Michael Wines, *Bush, in Far West, Sides With Loggers*, N.Y. TIMES, Sept. 15, 1992, at A25. The article went on to observe "[t]he challenge to put people ahead of owls drew cheers from nearly 5,000 people crammed into a chilly local lumberyard in Colville [Oregon], although residents said none of the forests in this part of the state are home to the owls." *Id.*

2. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-44 (1988 & Supp. III 1991)).

3. The Act has been amended seven times since 1973. Congressional Research Service of the Library of Congress for the Committee on Environment and Public Works, 97th Cong., 2d Sess., Ser. No. 97-6, A Legislative History of the Endangered Species Act of 1973, as amended in 1976, 1977, 1978, 1979, and 1980 (1982); see also Pub. L. No. 97-304, 96 Stat. 1411 (1982); Pub. L. No. 100-478, 102 Stat. 2306 (1988).

4. See, e.g., *Both Houses Rush to Move Spending Bills: Debate Centers on Salvage Sales, Grazing Hike, Mining Patent Ban*, LAND LETTER, Aug. 1, 1992, at 1 (statement of Rep. Don Young of Alaska, that "[i]f we do not change it [the ESA] to consider the human factor, we will have a revolution in this country"); see also Wines, *supra* note 1 (statement of President Bush).

5. 16 U.S.C. §§ 1533, 1536, 1538, 1539 (1988).

6. See *supra* note 3.

they represent a blueprint for how the federal government is to ensure co-existence with those parts of nature most vulnerable to human activity.

The thesis of this article is that, despite the blueprint, the ESA does not work this way. Over the years, the Departments of Interior and Commerce, the agencies primarily responsible for its implementation,<sup>7</sup> have converted an act of specific stages and clear commands into an act of discretion. Whether this result is good or bad is not the point. Recent evidence indicates that, whatever other result, the ESA has accommodated the overwhelming majority of human activity without impediment.<sup>8</sup> One reason for this study is to examine why—given the stringent sound of the ESA's requirements, and the rhetoric characterizing the Act as the "pit bull of environmental laws"<sup>9</sup> and a "sword aimed at . . . communities of entire regions"<sup>10</sup>—this result should follow.

The answer is that Interior and Commerce have interpreted each major stage of the ESA in a fashion of their choosing, albeit a fashion that Congress did not have in mind. The result is, in effect, an endangered species permit system in which the permitting is done largely at the Departments' discretion. This study documents this phenomenon by examining each of the ESA's critical stages in sequence: listing, designation of critical habitat, the determination of jeopardy, the exemption process, recovery, and habitat conservation planning.<sup>11</sup>

---

7. The ESA vests primary responsibility for its implementation in the Secretary of the Interior for terrestrial species and the Secretary of Commerce for marine species, 16 U.S.C. § 1532(15) (1988) (citing Reorganization Plan No. 4 of 1970, 35 Fed. Reg. 15,627 (1970)). Because their responsibilities are identical, this article uses the term "Interior" or "Secretary" for the actions of Interior and Commerce and the term "the Service," "FWS," or "NMFS" for actions of Interior's U.S. Fish and Wildlife Service and Commerce's National Marine Fisheries Service, unless otherwise indicated.

8. See *infra* text accompanying notes 263-82.

9. Timothy Egan, *Strongest U.S. Environmental Law May Become Endangered Species*, N.Y. TIMES, May 26, 1992, at A1, A13 (quoting Donald Barry of the World Wildlife Fund).

10. See *supra* text accompanying note 1. See also Associated Press, *U.S. Mines Director: Doesn't Believe In Endangered Species*, TIMES-PICAYUNE (New Orleans), Mar. 23, 1991 at A10 (statement of T.S. Ary, head of the United States Bureau of Mines: "I don't believe in endangered species. I think the only ones are sitting here in this room," he told a conference of miners, loggers, ranchers, farmers and other advocates of developing federal land.").

11. This article is the beneficiary of recent research on the ESA, including: James C. Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look From a Litigator's Perspective*, 21 ENVTL. L. 499 (1991) (a survey of the ESA's requirements); James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311 (1990) (failure to designate critical habitat); Katherine S. Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 ENVTL.

# Senate holds hearing on Endangered Species Act reform

By Rachel Schadegg

Posted on February 24, 2017



©Gage Skidmore

On Feb. 15, the Senate Committee on Environment and Public Works **held a hearing** entitled *"Oversight: Modernization of the Endangered Species Act,"* led by Chairman John Barrasso (R-WY). Throughout the hearing, Sen. Barrasso and other Republican Senators established their interest in amending the ESA – they are concerned by the impacts of current implementation on states, private landowners, and other stakeholders such as farmers and businesses, and they are frustrated with the slow rate and small number of species delisted due to recovery.

The hearing featured a five-member panel that testified on the ESA's purpose, implementation, and effectiveness and answered questions from Committee members about their perspectives on potential modification.

## Hearing introduction

In his opening statement, Sen. Barrasso emphatically declared that "the Endangered Species Act is not working today." He explained that since the ESA was enacted in 1973, less than three percent of listed species have sufficiently recovered to no longer need protections under the statute. He likened this statistic to a doctor who would lose their medical license with such a low rate of patient recovery and asserted that it is time to "modernize the Endangered Species Act."

Sen. Tom Carper (D-DE), the Committee's Ranking Member, was the only Democrat available to actively participate in the hearing due to unrelated emergency meetings. Carper expressed deep concern over the **sixth mass extinction**. He cautioned that any changes to the statute must preserve its original purpose and must result from a thoughtful analysis of "what modernization means" – including the consequences that potential proposals could inflict. He praised the ESA as a "lifeline that Congress first extended in 1973 to species struggling to adapt to a world forever altered by the presence of one species in particular – us – human beings." Sen. Carper encouraged the hearing participants to focus on areas of consensus.

## Panelist testimonies

## Search

To search, type and hit enter

## Most Popular



Duck! It's a drone!



Wildlife programs see cuts in USDA budget proposal



TWS 25TH ANNUAL CONFERENCE



Rattlesnakes may be overlooked seed dispersers



Last remaining 'wild' horses not so wild after all



New invasive species increase globally



Recovering with the butterflies



DOI budget request boosts energy, cuts wildlife



## Support TWS



## GWR Training for CE Credits

The first to testify, Former Wyoming Governor Dave Freudenthal called for a “disciplined” ESA **listing process** – he agreed that the purpose of the Act is important, but claimed that “the gate for getting in is too low” and suggested that the threshold for listing eligibility should be raised to alleviate a “flooded” system. He emphasized the role of individual states in carrying out **the ESA’s purpose** and criticized a “moving goal post” in regards to species such as the grizzly bear, the gray wolf, and the greater sage-grouse.

Joining in Gov. Freudenthal’s call for maximizing state involvement was Gordon Myers, North Carolina Wildlife Resources Commission Director and President of the Southeastern Association of Fish and Wildlife Agencies. He believes that **state authorities** granted by the ESA “have never been fully realized” and emphasized the power of interagency and interorganizational partnerships. Myers called for a clarified **distinction** between “threatened” and “endangered,” and recommended an improved listing process that expedites delistings and empowers the Secretary of the Interior in **critical habitat designation**.

Wisconsin Farm Bureau Federation President James Holte described how his state’s agricultural industry has been impacted by **gray wolf predation**, demonstrating his point with an account of a traumatized young farming family whose cattle were spooked and attacked by gray wolves. Gray wolves in Wisconsin are currently **listed as endangered** under the ESA, despite being proposed for delisting by FWS. Holte insisted that the state’s population has adequately recovered and farmers cannot “protect their livestock and their livelihoods” since shooting wolves is still illegal. He believes that Congress must help prioritize delistings.

Jamie Rappaport Clark, President and CEO of Defenders of Wildlife and former Director of the U.S. Fish and Wildlife Service under Pres. Clinton, defended the ESA as a successful statute that has guided the recovery of some of the nation’s most imperiled species. Her perspective squarely differed from Sen. Barrasso’s – “Simply put,” she stated, “the Endangered Species Act works.” She vowed, “The biggest problem that the Endangered Species Act faces is not a need for modernization – it is a **need for funding**. Conflict surrounding the Act arises when government agencies lack the resources to fully implement the law.”

Dan Ashe, President and CEO of the Association of Zoos and Aquariums and former Director of the USFWS under Pres. Obama, called the ESA a “catalyst” for **conservation partnerships**. “Mr. Chairman, saving species from extinction is very challenging,” Ashe explained. “It will become increasingly challenging in the future. The Endangered Species Act is the world’s gold standard, and it has helped us to achieve miracles. It is not perfect, and we can make it better. But as this Congress considers its future, your goal should be to make it stronger, faster, and better for the 21st century because life literally depends on it.”

### Questions and answers

During the time allotted for questions, Senators tried to focus discussion on what they see as major problems with the ESA. Many believe that there is a need for stronger collaboration with state and local authority, as well as measures to ensure that determinations are based on science rather than litigation. Opposing views were expressed over the idea of moving decisions, like **critical habitat designations**, to the front-end of the listing process. Ashe advised that moving critical habitat designation up to the listing process would create a huge backlog that would heavily burden the USFWS.

Agriculture was also a large point of interest. Sens. Fischer and Ernst asked the panelists about how agricultural tools and local partnerships could assist states and landowners with recovery and mitigation. Rappaport Clark maintained that pollinators and other species serve an **important purpose** in the country’s economic profile, and protecting them protects the agricultural industry from losses.

### ESA actions in Congress and TWS’ Stance

**Efforts to alter the ESA** have become a common occurrence in Congress. On Jan. 27, Rep. Pete Olson (R-TX) reintroduced the **Listing Reform Act**, an attempt to add an additional economic

## Training in Wildlife Chemical Capture

The most current & extensive courses

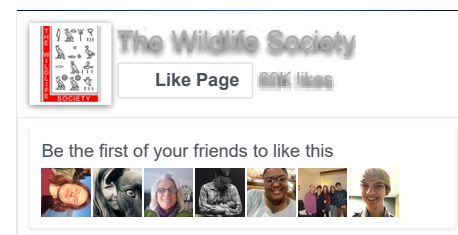


GLOBAL WILDLIFE RESOURCES  
MARK R. JOHNSON, DVM WILDLIFE VETERINARIAN  
Visit: <https://wildliferesources.com/>

### New Books From OUP



### Connect on Facebook



### AmazonSmile: Support TWS





review component to the ESA listing process that stalled in the House Committee on Natural Resources during the 114th Congress. Current species-specific legislation targets the **greater sage-grouse** (*Centrocercus urophasianus*) and populations of the **gray wolf** (*Canis lupus*) in Wyoming and the Great Lakes region.

The Wildlife Society considers the ESA to be imperative to the preservation of the nation's biodiversity and supports reform efforts that strengthen the law's effectiveness in preventing extinction and promoting recovery of threatened and endangered species. TWS' **Technical Review** on Practical Solutions to Improve the Effectiveness of the Endangered Species Act for Wildlife Conservation outlines potential improvements that would bolster the ESA's efficacy while consistently interpreting the law and fulfilling its requirements.

Read TWS' **Position Statement** on the Endangered Species Act.

**Rachel Schadegg** is a policy intern at The Wildlife Society as part of the **Government Affairs & Partnership** program. [Read more of Rachel's articles here.](#)

Committee on Environment and Public Works   Congress   Endangered Species Act  
hearing   John Barrasso   policy   Senate   testimony   Tom Carper

Like 177

Tweet

G+

## Related Articles



### Montana opts not to open grizzly hunts due to court battles

By Charlie Booher

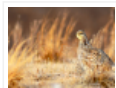


### USFWS Regulates Human Interactions with Listed Bat Species

By Lauren McDonald



### USFWS announces delisting of Yellowstone grizzly bears



### TWS endorses AFWA recommendations for 2018 Farm Bill

By Jamila Blake



### Land and Water Conservation Fund Expiration Nears

By Caroline E. Murphy

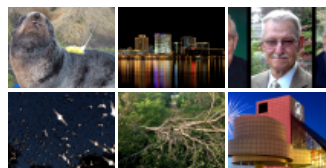
#### Contact Us

The Wildlife Society  
425 Barlow Place, Suite 200  
Bethesda, MD 20814  
Phone: (301) 897-9770  
Email: [tws@wildlife.org](mailto:tws@wildlife.org)

#### Social Media

#### Support TWS

#### TWS News in Pictures



#### AmazonSmile: Support TWS



**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

United States Court of Appeals  
Fifth Circuit

**FILED**

June 30, 2016

Lyle W. Cayce  
Clerk

\_\_\_\_\_  
No. 14-31008  
\_\_\_\_\_

MARKLE INTERESTS, L.L.C.; P&F LUMBER COMPANY 2000, L.L.C.; PF  
MONROE PROPERTIES, L.L.C.,

Plaintiffs - Appellants

v.

UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL M. ASHE,  
Director of United States Fish & Wildlife Service, in his official capacity;  
UNITED STATES DEPARTMENT OF INTERIOR; SALLY JEWELL, in her  
official capacity as Secretary of the Department of Interior,

Defendants - Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION  
NETWORK,

Intervenor Defendants - Appellees

\_\_\_\_\_  
Cons/w 14-31021  
WEYERHAEUSER COMPANY,

Plaintiff - Appellant

v.

UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL M. ASHE,  
Director of United States Fish & Wildlife Service, in his official capacity;  
SALLY JEWELL, in her official capacity as Secretary of the Department of  
Interior,

Defendants - Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION  
NETWORK,

Intervenor Defendants - Appellees

No. 14-31008  
Cons w/ No. 14-31021

---

Appeals from the United States District Court  
for the Eastern District of Louisiana

---

Before REAVLEY, OWEN, and HIGGINSON, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

This appeal requires us to consider the United States Fish and Wildlife Service's inclusion of private land in a critical-habitat designation under the Endangered Species Act. Misconceptions exist about how critical-habitat designations impact private property. Critical-habitat designations do not transform private land into wildlife refuges. A designation does not authorize the government or the public to access private lands. Following designation, the Fish and Wildlife Service cannot force private landowners to introduce endangered species onto their land or to make modifications to their land. In short, a critical-habitat designation alone does not require private landowners to participate in the conservation of an endangered species. In a thorough opinion, District Judge Martin L. C. Feldman held that the Fish and Wildlife Service properly applied the Endangered Species Act to private land in St. Tammany Parish, Louisiana. As we discuss below, we AFFIRM Judge Feldman's judgment upholding this critical-habitat designation.

### FACTS AND PROCEEDINGS

This case is about a frog—the *Rana sevosa*—commonly known as the dusky gopher frog.<sup>1</sup> These frogs spend most of their lives underground in open-

---

<sup>1</sup> See Designation of Critical Habitat for Mississippi Gopher Frog, 76 Fed. Reg. 59,774, 59,775 (proposed Sept. 27, 2011) (to be codified at 50 C.F.R. pt. 17) [hereinafter Revised Proposal]. The frog was previously known as the Mississippi gopher frog, but further taxonomic research indicated that the dusky gopher frog is different from other gopher frogs, warranting acceptance as its own species: the *Rana sevosa* or the dusky gopher frog. *Id.* We will refer to the frog as the dusky gopher frog.

No. 14-31008  
Cons w/ No. 14-31021

canopied pine forests.<sup>2</sup> They migrate to isolated, ephemeral ponds to breed. Final Designation, 77 Fed. Reg. at 35,129. Ephemeral ponds are only seasonally flooded, leaving them to dry out cyclically and making it impossible for predatory fish to survive. *See id.* at 35,129, 35,131. After the frogs are finished breeding, they return to their underground habitats, followed by their offspring. *Id.* at 35,129. When the dusky gopher frog was listed as an endangered species, there were only about 100 adult frogs known to exist in the wild.<sup>3</sup> Although, historically, the frog was found in parts of Louisiana, Mississippi, and Alabama, today, the frog exists only in Mississippi. Final Rule, 66 Fed. Reg. at 62,993–94; Final Designation, 77 Fed. Reg. at 35,132. The primary threat to the frog is habitat degradation. Final Rule, 66 Fed. Reg. at 62,994.

In 2010, under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–1544, the United States Fish and Wildlife Service (“the Service”)<sup>4</sup> published a proposed rule to designate 1,957 acres in Mississippi as “critical habitat” for the dusky gopher frog.<sup>5</sup> In response to concerns raised during the peer-review

---

<sup>2</sup> Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,118, 35,129 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Designation]. It appears that the frogs are not accustomed to human interaction. If you pick up a gopher frog and hold it, the frog will play dead and even cover its eyes; if you hold the frog long enough, it will peak at you and then pretend to be dead again.

<sup>3</sup> *See* Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993, 62,993, 62,995, 63,000 (Dec. 4, 2001) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Rule].

<sup>4</sup> The Secretary of the Department of the Interior and the Secretary of the Department of Commerce are jointly charged with administering the ESA. *See* 16 U.S.C. § 1532(15). The Secretary of the Interior administers the ESA through the Fish and Wildlife Service. We refer to both the Secretary and the agency as the “Service.”

<sup>5</sup> *See* Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,387, 31,387 (proposed June 3, 2010) (to be codified at 50 C.F.R. pt. 17) [hereinafter Original Proposal].

No. 14-31008  
Cons w/ No. 14-31021

process about the sufficiency of this original proposal, the Service’s final designation of critical habitat expanded the area to 6,477 acres in four counties in Mississippi and one parish in Louisiana. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,118–19. The designated area in Louisiana (“Unit 1”) consists of 1,544 acres in St. Tammany Parish. Final Designation, 77 Fed. Reg. at 35,118. Although the dusky gopher frog has not occupied Unit 1 for decades, the land contains historic breeding sites and five closely clustered ephemeral ponds. *See* Revised Proposal, 76 Fed. Reg. at 59,783; Final Designation, 77 Fed. Reg. at 35,123–24, 35,133, 35,135. The final critical-habitat designation was the culmination of two proposed rules, economic analysis, two rounds of notice and comment, a scientific peer-review process including responses from six experts, and a public hearing. *See* Final Designation, 77 Fed. Reg. at 35,119.

Together, Plaintiffs–Appellants Markle Interests, L.L.C., P&F Lumber Company 2000, L.L.C., PF Monroe Properties, L.L.C., and Weyerhaeuser Company (collectively, “the Landowners”) own all of Unit 1. Weyerhaeuser Company holds a long-term timber lease on all of the land that does not expire until 2043. The Landowners intend to use the land for residential and commercial development and timber operations. Through consolidated suits, all of the Landowners filed actions for declaratory judgment and injunctive relief against the Service, its director, the Department of the Interior, and the Secretary of the Interior. The Landowners challenged only the Service’s designation of Unit 1 as critical habitat, not the designation of land in Mississippi.

The district court allowed the Center for Biological Diversity and the Gulf Restoration Network (collectively, “the Intervenors”) to intervene as defendants in support of the Service’s final designation. All parties filed cross-

No. 14-31008  
Cons w/ No. 14-31021

motions for summary judgment. Although Judge Feldman granted summary judgment in favor of the Landowners on the issue of standing, he granted summary judgment in favor of the Service on the merits. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 748, 769 (E.D. La. 2014). The Landowners timely appealed.

### STANDARD OF REVIEW

We review a district court’s grant of summary judgment de novo. *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015); *see also Sabine River Auth. v. U.S. Dep’t of Interior*, 951 F.2d 669, 679 (5th Cir. 1992) (noting that the court of appeals reviews the administrative record de novo when the district court reviewed an agency’s decision by way of a motion for summary judgment). Our review of the Service’s administration of the ESA is governed by the Administrative Procedure Act (“APA”). *See Bennett v. Spear*, 520 U.S. 154, 171–75 (1997) (holding that a claim challenging the Service’s alleged “maladministration of the ESA” is not reviewable under the citizen-suit provisions of the ESA, but is reviewable under the APA); *see also* 5 U.S.C. §§ 702, 704. When reviewing agency action under the APA, this court must “set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations.” 5 U.S.C. § 706(2).

Review under the arbitrary-and-capricious standard is “extremely limited and highly deferential,” *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (internal quotation marks omitted), and “there is a presumption that the agency’s decision is valid,” *La. Pub. Serv. Comm’n v. F.E.R.C.*, 761 F.3d 540, 558 (5th Cir. 2014) (internal quotation marks omitted).

No.

---

---

**In the Supreme Court of the United States**

---

WEYERHAEUSER COMPANY,

*Petitioner,*

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

*Respondents.*

---

**Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit**

---

**PETITION FOR A WRIT OF CERTIORARI**

---

RICHARD C. STANLEY  
*Stanley, Reuter, Ross,  
Thornton & Alford, LLC  
909 Poydras Street, Suite  
2500  
New Orleans, LA 70112  
(504) 523-1580*

TIMOTHY S. BISHOP  
*Counsel of Record*  
CHAD M. CLAMAGE  
*Mayer Brown LLP  
71 South Wacker Drive  
Chicago, Illinois 60606  
(312) 782-0600  
tbishop@mayerbrown.com*

JAMES R. JOHNSTON  
ZACHARY R. HIATT  
*Weyerhaeuser Company  
220 Occidental Ave. S.  
Seattle, Washington 98104  
(206) 539-4361*

*Counsel for Petitioner*

---

---

## QUESTIONS PRESENTED

Congress enacted the Endangered Species Act to conserve “ecosystems upon which endangered species \* \* \* depend.” 16 U.S.C. § 1531(b). To that end, the Act requires the Secretary of the Interior to “designate any habitat of such species which is then considered to be critical habitat.” *Id.* § 1533(a)(3)(A). “Critical habitat” may include areas “occupied by the species,” as well as “areas outside the geographical area occupied by the species” that are determined to be “essential for the conservation of the species.” *Id.* § 1532(5)(A).

The Fish and Wildlife Service designated as critical habitat of the endangered dusky gopher frog a 1500-acre tract of private land that concededly contains no dusky gopher frogs and cannot provide habitat for them absent a radical change in land use because it lacks features necessary for their survival. The Service concluded that this designation could cost \$34 million in lost development value of the tract. But it found that this cost is not disproportionate to “biological” benefits of designation and so refused to exclude the tract from designation under 16 U.S.C. § 1533(b)(2).

A divided Fifth Circuit panel upheld the designation. The questions presented, which six judges of the court of appeals and fifteen States urged warrant further review because of their great importance, are:

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.
2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.



**PARTIES TO THE PROCEEDINGS BELOW**

In addition to petitioner Weyerhaeuser Company, plaintiffs-appellants below, respondents here, are Markle Interests, LLC, P&F Lumber Company 2000, LLC, and PF Monroe Properties, LLC, which are filing a separate petition for certiorari.

Defendants-appellees below, the federal agency respondents here, are the United States Fish and Wildlife Service; and, by operation of Rule 35.3, Greg Sheehan, in his official capacity as Acting Director of the United States Fish and Wildlife Service, and Ryan Zinke, in his official capacity as Secretary of the Department of Interior.

Intervenor-defendants-appellees below, and respondents here, are the Center for Biological Diversity and Gulf Restoration Network.

**CORPORATE DISCLOSURE STATEMENT**

Petitioner Weyerhaeuser Company is a publicly held company. It has no parent corporation and no publicly held company owns 10% or more of its stock.

## TABLE OF CONTENTS

Questions Presented .....	i
Parties to the Proceedings Below .....	ii
Corporate Disclosure Statement .....	ii
Opinions Below .....	1
Jurisdiction .....	1
Statutes and Regulations Involved .....	1
Statement .....	2
A. The Statutory And Regulatory Scheme .....	5
B. The ESA’s Critical Habitat Provisions .....	6
C. FWS’s Designation Of Unoccupied Critical Habitat For The Dusky Gopher Frog .....	9
D. The District Court Decision .....	12
E. The Fifth Circuit’s Divided Panel Decision And En Banc Vote .....	13
Reasons For Granting The Petition .....	14
I. The Fifth Circuit Misinterpreted The ESA’s Critical Habitat Provisions .....	14
A. The ESA Prohibits Designation Of Unit 1 As Critical Habitat. ....	15
B. The Fifth Circuit’s Ruling Conflicts With Decisions Of The Ninth Circuit. ....	24
II. The Meaning Of “Critical Habitat” Is Of Immense And Immediate Public Importance. ....	26
A. The Panel’s Ruling Inflicts Significant Costs On Private Landowners, With No Benefits To Endangered Species .....	26

B. FWS’s New Rule Formalizing Its Authority To Designate Unoccupied Non-Habitat Reinforces The Need For Immediate Review. ....	30
III. The Panel’s Erroneous Holding That FWS’s Decision Not To Exclude Unit 1 From Designation Is Judicially Unreviewable “Play[s] Havoc With Administrative Law” .....	31
Conclusion .....	33
Appendix A — Opinion of the court of appeals (June 30, 2016).....	1a
Appendix B — Opinion of the district court (Aug. 22, 2014) .....	78a
Appendix C — Order denying rehearing en banc (Feb. 13, 2017) .....	123a
Appendix D — Statutes Involved .....	163a
Appendix E — Regulations Involved.....	166a

## **PETITION FOR A WRIT OF CERTIORARI**

---

Petitioner Weyerhaeuser Company respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

### **OPINIONS BELOW**

The decision of the court of appeals (Pet. App. 1a-77a) is reported at 827 F.3d 452. The court of appeals' denial of rehearing en banc and opinion of six dissenting judges (Pet. App. 123a-162a) is reported at 848 F.3d 635. The decision of the district court (Pet. App. 78a-122a) is reported at 40 F.Supp.3d 744.

### **JURISDICTION**

The judgment of the district court granting in relevant part the defendants' motions for summary judgment was entered on August 22, 2014. RE100, Dkt. 130.<sup>1</sup> Weyerhaeuser Company ("Weyerhaeuser") timely appealed. RE49-50, Dkt. 133. The judgment of the court of appeals was entered on June 30, 2016. The court of appeals' order denying the petition for rehearing en banc was entered on February 13, 2017. Justice Thomas extended the time to file a petition for certiorari to July 13, 2017. No. 16A916 (Mar. 27 & June 9, 2017). Jurisdiction rests on 28 U.S.C. § 1254(1).

### **STATUTES AND REGULATIONS INVOLVED**

Relevant portions of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* ("ESA"), are reproduced at Pet. App. 163a-165a. U.S. Fish and Wildlife Service ("FWS") regulations describing the "criteria for

---

<sup>1</sup> The Record Excerpts of the Appellants filed in the Court of Appeals are cited as "RE."

designating critical habitat” that applied in this case appear at 50 C.F.R. § 424.12 (2011) and are reproduced at Pet. App. 166a-169a. The final designation of critical habitat for the dusky gopher frog is published at 77 Fed. Reg. 35118 (June 12, 2012).

### STATEMENT

The endangered dusky gopher frog, it is undisputed, needs three things for its habitat. 77 Fed. Reg. at 35131.

First, for breeding, it needs small isolated, ephemeral ponds embedded in open canopy forest.

Second, it needs upland, open canopy forest close to its breeding ponds to serve as non-breeding habitat. This forest needs to be “maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover.” *Ibid.*

Third, the frog needs upland habitat connecting its breeding and non-breeding grounds to allow movement between them. This too must have “an open canopy” and the “abundant native herbaceous species” of groundcover produced by frequent fires. *Ibid.*

These three “primary constituent elements” (“PCEs”) of frog habitat are each essential to “support the life-history processes of the species.” *Ibid.* If one is missing, the frog will not survive.

Respondent FWS designated as critical habitat for the dusky gopher frog areas of Mississippi occupied by the frog and other areas that the frog does not occupy but which have each of these three features. In addition—and at issue here—FWS designated 1544 acres of private forestry land in Louisiana. *Id.* at 35135.

There is no dispute that this Louisiana property (“Unit 1”) is not occupied by the frog. *Ibid.* (“the last

# Legal Planet

Insight & Analysis: Environmental Law and Policy

Biodiversity & Species | Litigation

HOLLY DOREMUS [January 24, 2018](#)

## When is unoccupied habitat “critical”?

The Supreme Court will hear a challenge to the critical habitat designation for the dusky gopher frog



Controversy and litigation have been pervasive since adoption of the Endangered Species Act in 1973, but the Supreme Court has been a relatively minor player in the law’s development. By my count, the Court so far has only addressed the substantive merits of an ESA claim three times (in *TVA v Hill*, 437 US 153 (1978); *Babbitt v Sweet Home Chapter of Communities for a Great Oregon*, 515 US 687 (1995), and *National Association of Home Builders v Defenders of Wildlife*, 551 US 644 (2007)). Looks like we’ll soon be able to add a fourth to that list. On Monday, the Court agreed to hear *Weyerhaeuser Co. v. US Fish and Wildlife Service*.

The conflict in *Weyerhaeuser* revolves around designation of critical habitat for the dusky gopher frog, the not terribly charismatic but critically endangered species pictured above. In 2015, when it issued a [recovery plan](#) for the frog, FWS estimated that “a minimum of 135 individual adult frogs survive in the wild,” almost all of them in a single population in Mississippi.

The dusky gopher frog lays its eggs in isolated seasonal ponds, where they hatch and develop as tadpoles over a period of three months or more. Once they metamorphose into frogs, they spend most of their of their lives in forested uplands, returning to the ponds annually to breed. Their lifecycle therefore requires ponds with the right conditions for breeding and tadpole survival, uplands with the right conditions for adult survival, and connections between those two that the frogs can and will negotiate annually.

That’s where critical habitat comes in. Under the ESA, FWS is supposed to designate critical habitat when it lists a species. Those two things have often not happened at the same time, though, because critical habitat is often both challenging to identify and controversial. The dusky gopher frog was listed in 2001, but critical habitat was not designated until 2012, in response to a lawsuit

brought by the [Center for Biological Diversity](#). Of course, once FWS designated critical habitat, its decision was promptly challenged from the other side.

The ESA defines critical habitat as: (1) portions of the geographic area occupied by the species at the time of listing which have physical or biological features essential to the conservation of the species which may require special management or protection; and (2) areas outside the species’ range at the time of listing “upon a determination by the Secretary [of Interior or Commerce] that such areas are essential for the conservation of the species.” The Secretary “may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits” of designation, unless without those areas the species would go extinct.

Critical habitat designation does not directly restrict private action, but it is often perceived as dramatically affecting the ability to use land and therefore the value of land. It has a direct legal effect only on federal actions. ESA section 7, the consultation provision, requires that federal agencies “insure” that any action they authorize, fund, or carry out “is not likely to . . . result in the destruction or adverse modification” of formally designated critical habitat. So, if a federal permit is needed to develop privately owned land that has been designated as critical habitat, consultation is required, which can cause delays, result in the imposition of conditions, and there is a risk (albeit a small one, [as Dave Owen has shown](#)) that they may not be able to get that permit. If no federal funding or permit is needed, though, private landowners are subject only to section 9’s prohibition on take, which applies with or without a critical habitat designation.

In its first cut at determining critical habitat for the dusky gopher frog, FWS proposed to designate less than 2,000 acres, all of it within Mississippi. Scientific reviewers objected, arguing that the proposed area was not large enough and could not protect the species from stochastic events that might destroy individual habitat units. FWS responded both by increasing the size of the areas it had identified in the original proposal, and by adding a new area consisting of 1500 acres in southeastern Louisiana’s St. Tammany Parish that contains a complex of ephemeral ponds.

It is this Louisiana unit, all of it privately owned and most of it in loblolly pine plantations, that is the subject of the case before the Court. Weyerhaeuser, which owns or holds in long-term timber leases the entire unit, contends (1) that the ESA does not permit designation of this land as critical habitat; and (2) that the courts below wrongly held that they could not review FWS’s refusal to exclude any of the Louisiana land from the critical habitat designation.

On the substantive issue, everyone agrees that the Louisiana unit does not currently support dusky gopher frogs. That alone is not grounds to question its designation. The ESA explicitly contemplates that areas outside the current range can be designated as critical habitat, provided that they are “essential for the conservation of the species.”



There is a real dispute in this case, though, about whether the Louisiana unit qualifies for critical habitat status. The statute explicitly limits occupied critical habitat to areas which contain the physical and biological features essential to the conservation of the species. It does not explicitly say that *unoccupied* habitat must have those features to be designated, just that it must be found by the agency to be essential. That difference could be read either way. One interpretation is that an area can’t be essential for conservation unless it currently has the features the species needs. Another is that an area can be essential if habitat beyond that currently occupied is needed to ensure viability, and it could be restored or modified to support the species.

The distinction is critical (no pun intended) in this case, because FWS conceded in its critical habitat rule that the Louisiana unit does not currently have all the features the dusky gopher frog needs. It has suitable breeding ponds, but the surrounding uplands are not currently suitable. Quoting FWS:

“ *Although the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort.*

Not surprisingly, Weyerhaeuser thinks that current unsuitability puts the Louisiana unit beyond the reach of the ESA. Areas that are not currently habitable by a species, it argues, cannot possibly be “critical habitat.” To hold otherwise, the company contends, puts all land in the country within the potential reach of overaggressive federal regulators.

It was equally unsurprising that FWS under the Obama administration adopted the broader reading. Indeed, in 2016 FWS formalized that view in revisions to the regulations governing critical habitat designation. Pointing to the textual difference in the statute, FWS explained that unoccupied areas do not need to contain the specifically identified physical or biological features that identify occupied critical habitat. (81 Fed. Reg. 7414, 7425)

What perhaps does raise an eyebrow is that the United States has maintained this position, at least for purposes of this litigation, despite the change of administration. It emphasizes the deference due to its interpretation of what it means for areas to be essential to the conservation of the species, as well as to its expert opinion that this unit meets that standard. It points out that the breeding ponds are the most unique and difficult to create or restore feature of dusky gopher frog habitat, and that the ponds in the Louisiana unit are currently suitable for the frog.

I don’t know how the Court will come out on this issue. I’m quite sure Weyerhaeuser’s argument that the decision below imposes no practical limit on the reach of intrusive federal regulation will appeal to several of the justices. On the other hand, FWS’s appeal to

deference to its technical expertise and its attempt to cabin the issue to the context of this particular case will appeal to others. A 5-4 decision one way or the other seems not unlikely.

On the second issue, whether the agency’s refusal to exclude lands that technically meet the definition of critical habitat from a designation is judicially reviewable, I’m also uncertain of the outcome but inclined to expect a ruling in favor of FWS. Courts are notoriously loathe to read themselves out of the job of overseeing agency action. It’s black-letter administrative law that decisions are unreviewable only if there is “no law to apply.” It’s clear from the text of the statute that this decision is highly discretionary, but not completely so. That argues for reviewability. But as I read the statute the “law to apply” is asymmetric. FWS *cannot* exclude lands from a critical habitat designation absent a finding that the benefits of exclusion outweigh the benefits of inclusion. Any exclusion should be reviewable to make sure that finding was made and is not arbitrary or capricious. But there is no requirement that all lands that fail the benefit comparison test be excluded: “The Secretary *may exclude*” land on that basis, but the statute does not say that the Secretary *must* do so.

Every reported decision on this issue has come to the same conclusion the Fifth Circuit did below: decisions not to exclude land from critical habitat are not judicially reviewable. Again, the US continues to defend that position. Although the mere fact that the Court took this case up might suggest its willingness to buck the crowd, I’m guessing that the unoccupied habitat issue was the tempting bait that got them to bite on this case. It’s certainly possible that the Court will decide that non-exclusions are reviewable, but I don’t think it’s likely that a majority will adopt that view.

◆ critical habitat, Endangered Species Act, judicial review, Obama administration, Supreme Court, Trump Administration, U.S. Fish and Wildlife Service

---