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## Endangered Species Act—Standards for Designating Critical Habitat

*Weyerhaeuser Co. v. United States Fish and Wildlife Service*, No. 17-71

In *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, a unanimous Supreme Court (with Justice Kavanaugh not participating because the case was argued before he joined the Court) vacated the decision of the Fifth Circuit that had held that the Fish and Wildlife Service properly designated private land in Louisiana as “critical habitat” for the endangered Dusky Gopher Frog under the Endangered Species Act (ESA), remanding the case for application of the Court’s newly announced legal standards. The land in question, managed as a commercial timber plantation by Weyerhaeuser, was not inhabited by the frog and, Weyerhaeuser argued, could not be inhabited by the frog without a radical remaking of the property, and hence was not “habitat” that could be designated as “critical” for the frog. The Fifth Circuit held that the ESA contains no habitability requirement, but the Supreme Court disagreed. It held as a matter of plain statutory language that “critical habitat” must first be “habitat” for the endangered species, and remanded for the Fifth Circuit to apply that correct legal rule. In addition, the Court agreed with Weyerhaeuser on a second issue: that the agency’s decision whether to exclude property from a critical habitat designation is subject to judicial review. The Fifth Circuit declined to review the agency’s statutorily-mandated weighing of the costs and benefits of excluding Weyerhaeuser’s property from critical habitat designation on the theory that Congress committed the decision to agency discretion and courts lack judicially-manageable standards of review. The Supreme Court disagreed, vacating and remanding for application of the usual Administrative Procedure Act abuse-of-discretion standard.

Chief Justice Roberts wrote the opinion, joined by all members of the Court except Justice Kavanaugh, who did not participate in the case.

Mayer Brown LLP represented the successful petitioner Weyerhaeuser, with Chicago partner Tim Bishop arguing the case.