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 *Weyerhauser Co. v. US Fish and Wildlife Service*.

The conflict in *Weyerhauser* 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. Weyerhauser, 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, Weyerhauser 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 Weyerhauser'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.