The U.S. Supreme Court filed its opinion in *Weyerhaeuser v. U.S. Fish and WIldlife Service* today. I've posted about this case previously here (when our clinic filed its brief on behalf of preeminent scientists) and here (on the day of the oral argument in the case). (Note that this blog post, like all my posts on this case, represents my personal analysis, and not that of our clinic's clients.) In this case, the Supreme Court reviewed a Fifth Circuit panel's determination that the Fish and Wildlife Service properly designated critical habitat for the Dusky Gopher Frog, raising significant issues about how the Endangered Species Act is applied. As I explained previously:

> In its opinion, the Fifth Circuit held that the Fish & Wildlife Service properly designated "critical habitat" for the Dusky Gopher Frog, based on evidence that that habitat was necessary for species survival and recovery. Included in the critical habitat is currently unoccupied habitat whose restoration was found by the Service to be not only possible, but necessary for the survival and recovery of the species. Because the primary cause of species endangerment is habitat loss, recovering and restoring degraded habitat is a necessary tool under the Act. Without it, many species could not recover and would inevitably go extinct. Critical habitat designation is important because it requires all federal agencies to ensure the protection of that habitat when those agencies undertake or approve activities that might harm it. Critical habitat may be designated on private land, but it generally doesn't affect the uses of that land unless those uses require federal agency approval.

The Supreme Court took up the question of whether the Fifth Circuit should have found that the Service improperly designated critical habitat, based on landowners' claims that the designation was in excess of the Service's legal authority. The Court issued a narrow opinion that ordered the Fifth Circuit to revisit the case. Interestingly, the opinion, authored by Chief Justice Roberts, was for a unanimous Court, meaning that the Court–sitting with only eight Justices for this case since Justice Kavanaugh didn't participate–was able to come to agreement despite sharp differences in the views of the Justices as expressed at oral argument. The opinion favors the landowner plaintiffs in the case, because it does not affirm the Fifth Circuit's determination that the Fish and Wildlife Service correctly designated critical habitat for the Dusky Gopher Frog. But the Court's decision doesn't say one way or the other whether the critical habitat designation

will hold up when the Fifth Circuit takes up the issue again. The opinion does not represent a final determination–or a determination at all–that the Service's decision was improper. Instead, the Court's decision remands the case to the Fifth Circuit for the panel to take a second shot at analyzing some of the important legal questions presented in the case, and keeps the critical habitat designation in place in the meantime.

The Court's opinion has two holdings.

First, the Court held that "critical habitat" must be determined to be "habitat," and its decision requires the Fifth Circuit to re-analyze the critical habitat determination in light of that holding. This holding is not as obvious as it sounds. In fact, the petitioners in this case didn't even squarely raise this argument before petitioning to the Supreme Court. In the trial court and the Fifth Circuit, they framed their arguments in terms of requiring that any area designated as critical habitat be "habitable." In the Supreme Court, the petitioners raised for the first time the argument that Congress intended the designation of "critical habitat" to require a determination that the area is "habitat." The Center for Biological Diversity argued to the contrary: that because the term "critical habitat" is specifically defined in the Endangered Species Act, the Fish and Wildlife Service and courts must interpret the term according to its statutory definition, and need not make an independent determination that the area is "habitat."

Here's the statutory definition:

> The term "critical habitat" for a threatened or endangered species means—(i)the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
> (ii)specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

By contrast, Congress did not define the term "habitat" in the Act, and notably did not use the word habitat in its definition of "critical habitat." The Center for Biological Diversity, a party in this case, argued that there is no requirement that "critical habitat" be "habitat," but rather the statutory definition of "critical habitat" should define the use of the term.

The 5th circuit applied the statutory definition of critical habitat to the facts of the case, and found the designation to be proper. As noted above, the panel did not even consider the idea that "habitat" would have to be separately defined, but instead considered the argument, proposed by petitioners, that critical habitat must currently be "habitable."

The Supreme Court, responding to the petitioners' new argument in the Supreme Court, found that the Fifth Circuit panel should have considered whether the designated area was habitat at all, as part of its analysis. The Court reasoned:

> Our analysis starts with the phrase "critical habitat." According to the ordinary understanding of how adjectives work, "critical habitat" must also be "habitat." Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality. It follows that "critical habitat" is the subset of "habitat" that is "critical" to the conservation of an endangered species.

The Court noted that "[t]he Court of Appeals concluded that 'critical habitat' designations under the statute were not limited to areas that qualified as habitat," and went on to conclude:

> The court therefore had no occasion to interpret the term "habitat" in Section 4(a)(3)(A)(i) or to assess the Service's administrative findings regarding Unit 1. Accordingly, we vacate the judgment below and remand to the Court of Appeals to consider these questions in the first instance.5th Circuit must now define "habitat" and apply that definition to its determination of whether Unit 1 in this case was properly designated as "critical habitat."

The Court did not define what "habitat" is, or whether the area at issue in this case is or isn't habitat, but instead directed the Fifth Circuit to consider that question (again, a question the Fifth Circuit panel didn't consider, because the parties didn't brief the issue). The Court, in short, left these questions to the Fifth Circuit to decide, noting that the United States's argument in the Supreme Court was that "habitat includes areas that, like Unit 1, would require some degree of modification to support a sustainable population of a given species," while the petitioners argued for a much narrower definition of the term.

"Habitat" certainly includes unoccupied areas, as the Court's opinion acknowledges (see the statutory definition of "critical habitat" above). At the same time, the petitioners in this case will argue for a very narrow definition of habitat, limited to areas that currently can support the species, as they argued in the Supreme Court. But the scientists most engaged in researching endangered species disagree sharply with the idea that habitat can possibly be defined that narrowly. In fact, the brief our clinic filed in the Supreme Court, on behalf of the most expert scientists in the world on what "habitat" means, addresses this issue squarely. Here's what we said:

> *Courts and federal agencies should employ a scientific understanding of habitat, not a dictionary definition, to conserve endangered species and fulfill Congress's mandates under the Endangered Species Act. … Habitat loss and degradation are the leading causes of species endangerment in North America. Congress commanded that the Fish and Wildlife Service use the "best scientific data available" in designating critical habitat to address species endangerment. To implement Congress's mandate, the Service must interpret the concept of habitat broadly, applying two core principles when it evaluates what habitat is necessary for species conservation. First, habitat is both spatially variable and temporally dynamic. Second, habitat must be understood broadly to evaluate effectively and accurately species' needs. As corollaries to these principles, several concepts are key: a proper understanding of habitat requires a landscape-scale view; habitats vary in quality, suitability, and location; an area need not be currently occupied or suitable to be essential for the long-term survival of a species; and habitat areas are capable of being restored to more suitable conditions. A definition of habitat that is limited to areas that are currently ideal for a species fails to account for the fact that habitat may vary in quality over space and time.*

> *Planning must account for this principle to ensure an endangered species has room not only to survive, but also to recover.*
>
> *In light of these principles and the important role critical habitat plays in species recovery, the Act requires that the Service include areas essential to species conservation, even where those areas are unoccupied or need restoration. Without landscape scale planning and the ability to designate of a broad range of habitat, including restorable habitat, as critical habitat, the Service cannot fulfill Congress's mandates under the Act. For these reasons, we conclude unequivocally that the Act requires an inclusive understanding of habitat. Petitioner's narrow unscientific interpretation would fail to provide for the survival and recovery of endangered species, ignoring Congress's plain mandate. To "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," 16 U.S.C. § 1531(b), using the "best scientific data available," courts and agencies must understand critical habitat to encompass all areas essential to that species' recovery.*

These scientists make the case for a capacious definition of "habitat" that would surely encompass the Service's decision to designate the habitat at issue here for the Dusky Gopher Frog, as well as to support appropriate designations of critical habitat for other species unlikely to survive without restoration of habitat that might not currently be hospitable to the species. And this flexible interpretation of habitat is also consistent with many prior determinations by the Service that have been essential to species conservation. In the end, the Court provides no analysis that would constrain the Court's determination of what "habitat" means. The Fifth Circuit's task on remand will be to make a determination, once again, whether the land in question is critical habitat—based in part on a determination of whether it is habitat at all.

Here's an interesting implication of this decision: I'm not aware of other cases where a court has required an agency to develop and apply a definition of individual undefined words within a phrase Congress defined, as the court did here, by requiring the Fifth Circuit to interpret the word "habitat" within the defined phrase "critical habitat." Observers, for the most part, have always assumed that when Congress defines a phrase, that phrase just means what Congress says it means and that agencies should simply interpret Congress's definition. The decision may thus have implications in other statutory/regulatory contexts. Here, in the absence

of a definition by the agency below, the Court must presumably now both define "habitat" and then apply that definition to determine the scope of the phrase "critical habitat" in this context– and its definition of "habitat" will serve to define a term never defined by Congress. And it bears noting, that in other cases, where an administrative agency rather than a court offers such a definition in the first instance, that determination will itself be subject to review under the *Chevron v. NRDC* standard of deference.

The Court's opinion included a second holding. The Service determined that its designation of critical habitat did not impose a disproportionate burden on the landowners. The Service must "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat," and the Secretary of Interior may "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." 16 U.S.C. § 1533(b)(2). In this case, the Service determined that the costs of the designation of this area as critical habitat did not outweigh the benefits. The Fifth Circuit didn't reach the merits of this question, but instead held that the determination was not reviewable by courts at all. The Supreme Court reversed this holding, and directed the Fifth Circuit to review whether the Service's cost-benefit determination was "flawed in a way that rendered the resulting decision not to exclude Unit 1 arbitrary, capricious, or an abuse of discretion." That review will provide another opportunity for the petitioners to argue that the Service did not follow the law. I expect it is likely the determination will be upheld on review based on my reading of the record in the case, but there is no guarantee of that result.

Finally, the Supreme Court did not vacate the critical habitat designation, so the Dusky Gopher Frog critical habitat designation remains in place while the proceedings continue in the Fifth Circuit.

[Note: This post has been slightly revised for clarity, 12:55 pm, 11/27/18.]