

Unanimous Supreme Court Vacates Fifth Circuit Affirmance of ESA Critical Habitat Listing

Article By:

James M. Auslander

W. Parker Moore

In a rare unanimous decision dated November 27, 2018, the U.S. Supreme Court increased scrutiny for critical habitat designations by the U.S. Fish and Wildlife Service (FWS) under the Endangered Species Act (ESA). The Supreme Court vacated and remanded lower court rulings that had upheld FWS's designation of critical habitat for the dusky gopher frog to include private property currently unoccupied by the frog and lacking the features that FWS deemed essential for its conservation. The Court considered two main issues: whether the ESA requires that "critical habitat" first be "habitat" for a species; and whether courts may review FWS's decision not to exclude a certain area from a critical habitat designation based on economic factors. The Court answered both questions in the affirmative.

Relying on the plain language of the ESA, the Court found that an area designated as "critical habitat" first must qualify as "habitat" for the species the designation is intended to benefit and concluded that the Fifth Circuit had failed to consider the habitability of the critical habitat area for the dusky gopher frog. The Court declined to supply a definition of "habitat" for that evaluation, however, noting that the ESA clarifies what makes a species' habitat area "*critical*," but not what makes it "*habitat*" in the first instance. Accordingly, the Court remanded to the Fifth Circuit to interpret the meaning of "habitat," including specifically whether the administrative record in this case sufficiently supports that the dusky gopher frog could survive in the disputed area.

Secondly, the Court found that FWS's decision whether to exclude areas from a critical habitat designation based on economic factors is reviewable. The Court held that a challenge to an agency's cost-benefit analysis is precisely the kind of claim that federal courts regularly evaluate under the Administrative Procedure Act. The Court found that nothing in the ESA uniquely foreclosed judicial review of the analysis, and remarked that if an agency decision is rendered unreviewable whenever it implicates agency discretion, then a court could never evaluate whether the agency has abused that discretion. The Court therefore instructed the Fifth Circuit to review FWS's economic impact analysis and determine whether its subsequent decision to include or exclude areas from the critical habitat designation was arbitrary, capricious, or an abuse of discretion.

Going forward, whether the Fifth Circuit decides the issues or in turn remands to the district court,

resolution of the case likely will require several more months. In the interim, FWS may issue a final rule addressing designation of critical habitat under the ESA. [Click here](#) for our summary of FWS's proposed rules. Either way, the Supreme Court's ruling likely will provide additional fodder for private property owner challenges to critical habitat designations encompassing their lands.

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