

Supreme Court Sends Dusky Gopher Frog Case To 5th Circ.

By Jimmy Hoover

Law360, Washington (November 27, 2018, 10:49 AM EST) -- The U.S. Supreme Court sent a dispute between Weyerhaeuser Co. and the U.S. Fish and Wildlife Service involving the dusky gopher frog back to the Fifth Circuit on Tuesday, though the court's ruling gives the timber company a leg up in its fight over the future of a 1,500-acre tract of land in Louisiana.

The high court unanimously vacated a lower court decision that affirmed the FWS' decision to protect area owned by Weyerhaeuser and others for the endangered frog. It then remanded the case back to the Fifth Circuit to settle key legal issues in the case. Justice Brett Kavanaugh, who was not on the court for the Oct. 1 arguments in the case, did not participate in Tuesday's decision.

Among the issues on remand is whether the FWS abused its discretion by concluding that the conservation benefits of designating the area a "critical habitat" for the frog would outweigh the \$33.9 million in potential costs from barring future development. The Fifth Circuit had held that the agency's decision was nonreviewable under the Endangered Species Act, but the Supreme Court disagreed Tuesday.

Writing for the court, Chief Justice John Roberts quoted a past ruling in which the court held that the Administrative Procedure Act created a "basic presumption of judicial review," and that "the few" exceptions have included things like the allocation of funds, or refusing to reconsider a final action.

"By contrast," Chief Justice Roberts wrote, "this case involves the sort of routine dispute that federal courts regularly review: An agency issues an order affecting the rights of a private party, and the private party objects that the agency did not properly justify its determination under a standard set forth in the statute."



The Supreme Court on Tuesday held off on ending a dispute over whether a 1,500-acre tract in Louisiana can be protected for the endangered dusky gopher frog, saying the Fifth Circuit must first determine the meaning of the word "habitat." (AP)

During oral arguments in the case, justices from both the liberal and conservative wings of the court grilled an attorney for the government about the scope of the FWS' discretion to designate critical habitat under the ESA.

The dusky gopher frog was listed as endangered in 2001, when its population was thought to have dropped to only 100 in one pond in Mississippi, according to the opinion. In light of its dire fate, the FWS proposed designating the 1,544-acre site as critical habitat because of the quality of its ephemeral ponds — those that are periodically dry, providing tadpoles with safety from fish.

Weyerhaeuser and other Louisiana property owners had argued that the frog species hadn't been spotted at the site in decades, and that the species' supposed "critical habitat" can't include areas where it can't currently survive. The Fifth Circuit rejected that argument and said that the definition of "critical habitat" doesn't contain a "habitability requirement."

The Supreme Court disagreed with the appeals court.

"According to the ordinary understanding of how adjectives work, 'critical habitat' must also be 'habitat,'" Chief Justice Roberts wrote.

But the chief justice left it for the Fifth Circuit to decide what "habitat" means; namely, whether it includes an area like the 1,500 acres of a now-closed timber plantation, which would need modification to support the species. The FWS has said that restoring an open-canopy forest in parts of the area would help the species.

"It was certainly good to have the unanimous court agree with Weyerhaeuser on both of its legal arguments — that 'critical habitat' must first be 'habitat,' and that FWS' decision not to exclude a site from designation, and FWS' economic analysis in support of that decision, are subject to judicial review in the normal course," said Timothy Bishop of Mayer Brown LLP, who argued the case for Weyerhaeuser.

A spokesperson for the U.S. solicitor general's office declined to comment on the ruling Tuesday.

Weyerhaeuser Co. is represented by Timothy S. Bishop, Chad M. Clamage and Jed W. Glickstein of Mayer Brown LLP, Richard C. Stanley of Stanley Reuter Ross Thornton & Alford LLC and in-house by James R. Johnston and Zachary R. Hiatt.

Other property owners are represented by Jonathan Wood, Damien M. Schiff, Anthony L. François, Oliver J. Dunford, Christina M. Martin of the Pacific Legal Foundation and Edward B. Poitevent II of Stone Pigman Walther Wittman LLC.

The federal agencies are represented by Noel J. Francisco, Jeffrey H. Wood, Mary Hollingsworth, Edwin S. Kneedler, Jeffrey E. Sandberg, Andrew C. Mergen and J. David Gunter II of the U.S. Department of Justice.

The case is *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service et al.*, case number 17-71, in the Supreme Court of the United States.

--Additional reporting by Juan Carlos Rodriguez. Editing by Rebecca Flanagan.

Update: This story has been updated with more detail from the high court's ruling.

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