SCOTUS Remands Dusky Gopher Frog Case to Lower Court After Reviewing Eligibility of "Critical Habitat" Under the Endangered Species Act of 1973

In *Weyerhauser Co. v. United States Fish and Wildlife Service.,* 586 U.S. ____ (2018), the United States Supreme Court held that an area is eligible for designation as "critical habitat" under the Endangered Species Act only if it is habitat for the species. The provision referenced by the Court is the sole source of authority for critical-habitat designation.

The Court also held a federal court may review an agency decision not to exclude an area from critical habitat because of the economic impact. The United State Fish and Wildlife Service (Service) listed the dusky gopher frog as an endangered species. The Service designated as its "critical habitat" a site called Unit 1 in Louisiana owned or leased by a timber company. The frog had not been seen at this location since 1965. As of today, the aforementioned site has all of the features the frog needs to survive except "open-canopy forests," which the Services claims can be restored with "reasonable effort."

The timber company argued Unit 1 could not be a "critical habitat" for the frog because it could not survive without an open-canopy forests. The Fifth Circuit disagreed holding that the definition of critical habitat contains no "habitability requirement." The Supreme Court held unanimously that "critical habitat" must be habitat. The Endangered Species Act (ESA) states that when the Secretary of the Interior lists a species as endangered, he or she must also "designate *any habitat of such species* which is then considered to be critical habitat."

The Service argued that habitat includes areas like Unit 1 one which "require some degree of modification to support a sustainable population of a given species." The Supreme Court sent this case back to the lower court to "interpret the term 'habitat.'" The ESA requires the Secretary to consider the economic impact of specifying an area as a critical habitat and authorizes the Secretary to "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." The timber company claimed the Service failed to fully account for the economic impact of designating Unit 1. The lower court refused to review the Service's decision-making process. The Supreme Court concluded it is reviewable. It "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."

New "Waters of the U.S." (WOTUS) Definition Proposed by the EPA and Army

The proposed new "Waters of the U.S." intends to replace the 2015 definition under the Obama administration with one that is stated by the Trump administration to respect the limits of the Clean Water Act and provide states and landowners the certainty they need to manage their natural resources and grow local economies. As stated by the acting EPA Administrator, "For the first time, we are clearly defining the difference between federally protected waterways and state protected waterways. Our simpler and clearer definition would help landowners

understand whether a project on their property will require a federal permit or not, without spending thousands of dollars on engineering and legal professionals."

The EPA and the Department of the Army for Civil Works continue to review the U.S. District Court for the District of South Carolina's decision to nationally enjoin the agencies' final rule that added an applicability date to the 2015 Clean Water Rule. Pursuant to the court's order, the 2015 Clean Water Rule is now in effect in 22 states, the District of Columbia, and the U.S. territories. Parties to the case, including the EPA and the Army, have filed motions appealing the order and seeking a stay of the district court's decision. While the litigation continues, the agencies are complying with the district court's order and implementation issues that arise are being handled on a case-by-case basis. The agencies recognize the uncertainty this decision has created and are committed to working closely with states and stakeholders to provide updated information on an ongoing basis regarding which rules are in place in which states. If a state, tribe, or an entity has specific questions about a pending jurisdictional determination or permit, please contact a local U.S. Army Corps of Engineers District office or the EPA.

The Environmental Protection Agency and the Department of Army are taking comment on the 2018 proposed WOTUS rules 60 days after publication in the *Federal Register (*date not determined as of yet*)*, and will hold a public hearing in Kansas City, KS.

Frequently asked questions may be viewed at the embedded link.

Editor's Note: Legal Line is a feature that will periodically appear in NACO E-Line. This article has been prepared by Elaine Menzell of the NACO legal staff. Legal Line is not intended to serve as legal advice. Rather, it is published to alert readers to court decisions and legal or advisory matters important to county government. For a specific opinion on how the information contained in this article or that which will be discussed in future issues relates to your county, consult your county attorney or personal counsel.