

*Weyerhaeuser v. U.S. Fish and Wildlife Service*, No. 17-71, 2018 WL 491540  
(U.S., Jan. 22, 2018)

### **U.S. Supreme Court Grants Certiorari in Challenge to Government's Dusky Gopher Frog Critical Habitat Designation**

In January 2018, the U.S. Supreme Court granted certiorari in *Weyerhaeuser v. U.S. Fish and Wildlife Service*. In this case, property owners challenged the U.S. Fish and Wildlife Service's ("USFWS") determination that 1,500 acres of private property in Louisiana is protected as a "critical habitat" for the dusky gopher frog under the Endangered Species Act ("ESA").

The petition for certiorari asked the Court to consider two issues: (1) whether the ESA prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation and (2) whether an agency decision not to exclude an area from critical habitat because of economic impact of designation is subject to judicial review.

The ESA requires the Secretary of the Interior to designate any habitat of endangered species which is then considered to be critical habitat as "critical habitat." Under the ESA, "critical habitat" means areas "occupied by the species" and "areas outside of the geographical area occupied by the species" that are determined to be "essential for the conservation of the species."

The property owners argue that this designation is an abuse of federal power and overstepping of authority—mostly because the dusky gopher frog has not been seen in the area for many years and the property is unsuitable as frog habitat as it exists today. Although USFWS acknowledged this fact, USFWS argues that certain characteristics of frog habitat found within the 1,500 acres are rare and the dusky gopher frog could prosper on the land, making the land "essential" under the definition of "critical habitat."

This case could heavily influence individuals' property rights and how the "critical habitat" section of the ESA will be implemented in the future. If the Court sides with the property owners, USFWS would be hard-pressed to designate land as "critical habitat" where no single endangered species currently exists and cannot currently survive. We will provide updates to this case as they become available.