

Endangered Species Act: Critical Habitat Designation After *Weyerhaeuser*

<b>I. Critical Habitat Designation and the Endangered Species Act</b>	<b>1</b>
A. Background: Critical Habitat, Section 7 Consultation, and Critical Habitat Designation	1
B. Questions Regarding the Scope of Critical Habitat Designation	7
1. The Services’ Statutory Obligations	7
2. Statutory Interpretation of “Critical Habitat”	9
<b>II. <i>Weyerhaeuser Co. v. U.S. Fish &amp; Wildlife Service</i></b>	<b>12</b>
A. Background of the Case	12
B. Supreme Court’s Statutory Analysis	18
C. Potential Implications of Supreme Court’s Approach	24
<b>III. Aftermath of <i>Weyerhaeuser</i></b>	<b>29</b>
A. Trump Administration’s Regulatory Response	29
B. Biden Administration’s Regulatory Response	31
<b>IV. Alternative Interpretive Approaches to Critical Habitat Designation</b>	<b>33</b>
A. Leaving “Habitat” Undefined	34
B. Defining “Habitat” Broadly	38
C. Defining “Habitat” Narrowly	40

**I. Critical Habitat Designation and the Endangered Species Act**

**A. Background: Critical Habitat, Section 7 Consultation, and Critical Habitat Designation**

The Endangered Species Act (ESA) of 1973<sup>1</sup> is the United States’ foremost legislation for the protection of vulnerable species.<sup>2</sup> A key aspect of the ESA’s statutory framework of protection for a given species is the identification and designation of the geographic areas that

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<sup>1</sup> 16 U.S.C. §§ 1531–44.

<sup>2</sup> *See, e.g., Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) (“[T]he Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”).

the species lives in and depends on, which must likewise be protected.<sup>3</sup> These areas are categorized in the ESA as “critical habitat”.<sup>4</sup> In the context of vulnerable species that are officially listed under the ESA as threatened or endangered (“listed species”), critical habitat is defined as follows:

[T]he specific areas within the geographical area occupied by the species, at the time it is listed ... on which are found those physical or biological features ... essential to the conservation of the species and ... which may require special management considerations or protection; and ... specific areas outside the geographical area occupied by the species at the time it is listed ... upon a determination ... that such areas are essential for the conservation of the species.<sup>5</sup>

These statutory terms create an affirmative obligation: within their jurisdictions,<sup>6</sup> the Secretaries of Commerce and the Interior, via the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), respectively, “shall, concurrently with making a determination ... that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat”.<sup>7</sup> In other words, the designation of critical habitat is an explicit statutory obligation which the FWS and the NMFS (“the Services”) are charged with carrying out.<sup>8</sup> when the Services determine that a given species should be listed as threatened or endangered, the areas that constitute the species’ critical habitat must likewise be designated for special consideration and protection.

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<sup>3</sup> *Id.* at 179 (“In shaping legislation to deal with the problem thus presented, Congress started from the finding that ‘[t]he two major causes of extinction are hunting and destruction of natural habitat.’” (quoting S.Rep.No.93–307, p. 2 (1973) U.S. Code Cong. & Admin. News 1973, pp. 2989, 2990)).

<sup>4</sup> 16 U.S.C. § 1532(5)(A).

<sup>5</sup> *Id.*

<sup>6</sup> *See, e.g.,* Nat’l Ass’n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 651 (2007) (“The Fish and Wildlife Service (FWS) administers the ESA with respect to species under the jurisdiction of the Secretary of the Interior, while the National Marine Fisheries Service (NMFS) administers the ESA with respect to species under the jurisdiction of the Secretary of Commerce.”).

<sup>7</sup> 16 U.S.C. § 1533(a)(3)(A)(i).

<sup>8</sup> *See id.; see also, e.g.,* Bennett v. Spear, 520 U.S. 154, 154 (1997) (“The Endangered Species Act ... requires the Secretary of the Interior to specify animal species that are ‘threatened’ or ‘endangered’ and designate their ‘critical habitat’”) (emphasis added).

Despite this obligatory status, critical habitat designation has been a relatively underused conservation tool for much of the ESA’s existence, in part because the Services’ concerns about issues such as resource limitations and potential political backlash tend to weigh against the decision to designate a given area.<sup>9</sup> To that end, agency practice and interpretation has tended to limit the scope of the Services’ obligation to designate areas as critical habitat—sometimes beyond the extent to which courts have found this obligation can reasonably be limited under the terms of the ESA.<sup>10</sup>

Once critical habitat designations enter into effect, however, they carry significant weight. As the Supreme Court wrote in *Tennessee Valley Authority v. Hill*, the terms of the ESA “affirmatively command all federal agencies ‘to insure that actions *authorized, funded, or carried out* by them do not *jeopardize* the continued existence’ of a listed species or ‘result in the destruction or modification of [critical] habitat of such species’”.<sup>11</sup> Because Congress gave such a high priority to the conservation of listed species under the ESA, agencies are required to give precedence to the protection of critical habitat, even when doing so could potentially conflict with the agency’s primary mission, interfere with the completion of an ongoing project, or cause the unrecoverable loss of tens of millions of dollars.<sup>12</sup>

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<sup>9</sup> See generally James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 Harv. Envtl. L. Rev. 311 (1990).

<sup>10</sup> See, e.g., *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1069–70 (9th Cir. 2004), *amended*, 387 F.3d 968 (9th Cir. 2004) (finding that FWS regulations impermissibly narrowed the Agency’s interpretation of the types of critical habitat protected by the ESA).

<sup>11</sup> 437 U.S. at 173 (quoting 16 U.S.C. § 1536 (1976 ed.)). Although the quoted section of the ESA is truncated in the Court’s opinion to read simply “habitat”, the statutory text goes on to specify that the “habitat” in question is habitat which is “determined by the Secretary, after consultation as appropriate with affected States, to be critical”, i.e. “critical habitat” under the ESA. As discussed in sections II(A–B) *infra*, the relationship between the statutorily defined term “critical habitat” and the non-statutorily-defined term “habitat” in the text of the ESA would be a central issue addressed by the Court in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, 139 S.Ct. 361 (2018), although earlier opinions like *Tennessee Valley Authority* used the terms interchangeably.

<sup>12</sup> See *id.* at 185–88.

In practice, the ESA’s statutory obligation largely consists of requiring federal agencies to consult with the Services in order to ensure that planned federal actions will not threaten listed species or their critical habitat. This process, known generally as Section 7 consultation, is a key substantive and procedural requirement of the ESA.<sup>13</sup> Section 7 consultation is particularly crucial to the issue of critical habitat, as it is the only statutory mechanism in the ESA that serves to protect critical habitat in its own right:<sup>14</sup> while the ESA also includes certain prohibitions on activities that affect certain subsets of a species’ territory and that could potentially kill or injure listed species, the Supreme Court has interpreted these provisions to apply only to activities which risk directly causing harm to individuals of the species in question, not to activities that have less direct harmful effects on the land and other resources required for the species’ well-being.<sup>15</sup> Because Section 7 consultation treats critical habitat itself as a protected category, the consultation process and its related statutory obligations are an important mechanism in terms of both protection and proactive conservation efforts.

Following the initial consultation, the Services have several additional obligations to fulfill, including the creation of a “biological opinion” describing how the action in question would affect a listed species or its critical habitat.<sup>16</sup> If the action would jeopardize the species or adversely modify its critical habitat, the Services will suggest “reasonable and prudent” alternatives to the proposed action.<sup>17</sup> “Following the issuance of a ‘jeopardy’ opinion, the agency

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<sup>13</sup> See Jason C. Rylander, Megan Evansen, Jennifer R.B. Miller & Jacob Malcom, *Defining Habitat to Promote Conservation Under the ESA*, 50 *Envtl. L. Rep.* 10531, 10533 (2020).

<sup>14</sup> See *id.*

<sup>15</sup> See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 707–08 (1995) (“[T]he Secretary reasonably construed the intent of Congress when he defined ‘harm’ to include ‘significant habitat modification or degradation that actually kills or injures wildlife.’”).

<sup>16</sup> 16 U.S.C. § 1536(b)(3)(A); see also 50 CFR § 402.14(h).

<sup>17</sup> 16 U.S.C. § 1536(b)(3)(A); see also 50 CFR § 402.14(h)(3).

must either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee pursuant to 16 U.S.C. § 1536(e).”<sup>18</sup> By structuring agencies’ options in this manner, critical habitat designations can significantly inform and shape the actions that the federal government takes in the areas in question.

Importantly, the ESA sets out not only the process that the Services and affected agencies must take during the Section 7 consultation process, but also the relatively broad scope of “jeopardy or adverse modifications” in the context of critical habitat;<sup>19</sup> given that critical habitat is framed in terms of the conservation of listed species,<sup>20</sup> which, as defined in the ESA, includes the recovery of the species to the point where ESA protections are no longer needed,<sup>21</sup> courts have rejected narrow agency interpretations of Section 7 that would limit the role of critical habitat by finding jeopardy or adverse modification only when the species’ survival is at risk.<sup>22</sup> In other words, the Services’ inquiry into potential “jeopardy or adverse modification” in the Section 7 consultation process extends not just to actions which would put the species in question at immediate risk of extinction, but also to actions which would harm the broader conservation goals laid out in the ESA and put the overall recovery of a listed species at risk by

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<sup>18</sup> Nat’l Ass’n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 652 (2007) (additionally citing 50 CFR §§ 402.03–.04).

<sup>19</sup> 16 U.S.C. § 1536(b)(3)(A).

<sup>20</sup> 16 U.S.C. § 1532(5)(A).

<sup>21</sup> 16 U.S.C. § 1532(3) (“The terms ‘conserve’, ‘conserving’, and ‘conservation’ mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.”); *see, e.g.* Sierra Club v. U.S. Fish & Wildlife Serv., 245 F.3d 434, 441–42 (5th Cir. 2001) (“‘Conservation’ is a much broader concept than mere survival. The ESA’s definition of ‘conservation’ speaks to the recovery of a threatened or endangered species.”).

<sup>22</sup> *See, e.g.* Gifford Pinchot Task Force *amended*, 387 F.3d 968 (9th Cir. 2004) (“the ESA was enacted not merely to forestall the extinction of species (i.e., promote a species survival), but to allow a species to recover to the point where it may be delisted”); *N. New Mexico Stockman’s Ass’n v. United States Fish & Wildlife Serv.*, No. 21-2019, 2022 WL 1123013, at \*8 (10th Cir. Apr. 15, 2022) (“Rather than encompassing only actions that affect the survival and recovery of a species, as the jeopardy standard already does ... habitat modification covers actions that affect the conservation of a species, which makes the definition broader in scope”).

adversely modifying its critical habitat.<sup>23</sup> Critical habitat designations are made in the same statutory context as Section 7; therefore, courts have found that it follows that the Services' obligation to designate an area as critical habitat likewise extends to areas which are essential to a species' overall restoration and recovery, even if that area may not be essential for the species' immediate survival.<sup>24</sup>

Given this statutory background, while the terms of the ESA may seem at first glance to primarily serve to constrain federal agencies with regard to critical habitat, designating an area as critical habitat can also create new opportunities for proactive government action to support vulnerable species.<sup>25</sup> While prevention of direct harm to the survival of a listed species is often the effect of the Section 7 consultation process, the scope of "critical habitat" in the ESA is not necessarily limited to simply preventing harm to listed species, considering that the statutory definition refers to a broader concept of conservation which includes species recovery.<sup>26</sup> Therefore, in addition to protecting existing areas which are currently inhabitable for a given species, a critical habitat designation can potentially create an obligation for the relevant agencies to actively restore aspects of an area which would promote the species' well-being, returning the area to the condition suitable for habitation by the listed species.<sup>27</sup> For example, a critical habitat designation was recently the impetus for the U.S. Forest Service to engage in a

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<sup>23</sup> See *Sierra Club*, 245 F.3d 434, 442–43; see generally Michael Fuller, *Sierra Club v. U.S. Fish and Wildlife Service: The Phoenix of Critical Habitat Designation*, 7 *Ocean & Coastal L.J.* 353 (2002) (discussing throughline between the Fifth Circuit's decision in *Sierra Club* and other legislative history and judicial precedent affirming Services' obligation under ESA to promote recovery of listed species through critical habitat designation).

<sup>24</sup> See, e.g. *Sierra Club*, 245 F.3d 434, 442–43 (discussing Services' obligation to designate critical habitat in the context of recovery—not just "survival"—of listed species).

<sup>25</sup> See generally Rylander et al., *supra* note 13.

<sup>26</sup> 16 U.S.C. § 1532(5)(A).

<sup>27</sup> See Rylander et al., *supra* note 13, at 10533–34.

collaborative project to restore tracts of riparian land which are critical habitat for the endangered New Mexico meadow jumping mouse.<sup>28</sup>

Despite these examples of successful uses of the critical habitat designation process for restoration, the applicability of critical habitat designation in the broader conservation context has been the subject of some controversy in recent years. Because targeting currently uninhabitable land for the purposes of protection or restoration necessarily entails designating an area where the species in question does not actually live as “critical habitat”, a legal debate has grown around the question of what types of geographic areas may reasonably be designated as critical habitat without going impermissibly beyond the ESA’s definition of the term. This controversy relates to both the scope of the Services’ statutory authority under the ESA framework and the statutory interpretation of “critical habitat” within the text of the ESA. Both of these issues were recently addressed by the Supreme Court in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*,<sup>29</sup> a case which, by announcing a new interpretive limit on the scope of critical habitat designations, may have far-reaching consequences for both ESA jurisprudence and conservation policy in general.

## B. Questions Regarding the Scope of Critical Habitat Designation

### 1. The Services’ Statutory Obligations

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<sup>28</sup> *Id.*; see also Designation of Critical Habitat for the New Mexico Meadow Jumping Mouse, 81 Fed. Reg. 14264, 14267 (2016) (to be codified at 50 C.F.R. pt. 17), U.S. Forest Service, *New Mexico Meadow Jumping Mouse Habitat Improvement Projects on the Agua Chiquita Grazing Allotment*, <https://perma.cc/9HUP-BGBB>.

<sup>29</sup> 139 S. Ct. 361 (2018).

While the ESA creates an obligation to designate some areas as critical habitat, the statute does not give the Services unlimited discretion over whether a given area may be designated.<sup>30</sup> Designations of critical habitat (and revisions to designated areas) must be made “on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat”; areas where these negative impacts would outweigh the benefits of critical habitat designation are to be excluded from the designation.<sup>31</sup>

These decision-making requirements, which call for a balancing test between adverse effects on the listed species and a variety of other considerations, have led to some confusion and controversy regarding the Services’ determinations of which areas are designable as critical habitat.<sup>32</sup> Because “best scientific data available” is not itself defined in the ESA, and because some of the factors to be considered, such as impacts on the economy and national security, fall outside of the core scientific expertise of the FWS and NMFS, the scope of these statutory requirements is somewhat unclear; as a result, critical habitat designations have frequently been challenged on the basis that the Services lacked adequate data to make the determination that a given area was critical habitat or failed to adequately consider countervailing impacts such as economic harm.<sup>33</sup> In analyzing these claims, different circuits have historically given different degrees of deference to the Services. For instance, the Ninth Circuit has arguably been more deferential to the Services’ explanations for critical habitat designations, whereas the District of

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<sup>30</sup> See 16 U.S.C. §1533(b)(2).

<sup>31</sup> *Id.*

<sup>32</sup> See generally Katherine Lee, “Bears Need Room to Roam”: *The Ninth Circuit's Questionable Interpretation of Critical Habitat Designation*, 59 B.C. L.Rev. E-Supplement 206 (2018).

<sup>33</sup> *Id.* at 215–17.



Columbia Circuit has been perceived as more willing to second-guess their reasoning.<sup>34</sup> Adding further unpredictability, the ESA’s definition of “critical habitat” itself is also subject to multiple interpretations, and has been interpreted differently by different agencies and courts.<sup>35</sup> All of these considerations make critical habitat designations a fraught and frequently controversial proposition for agencies and affected parties alike.

## 2. Statutory Interpretation of “Critical Habitat”

The central statutory interpretation issue for critical habitat designations is the question of which geographical areas may permissibly be designated as “critical habitat”. Although the ESA provides a statutory definition of “critical habitat” in its definitions section,<sup>36</sup> the language within this definition is subject to multiple interpretations,<sup>37</sup> particularly because the term “habitat” itself is not independently defined within the ESA.<sup>38</sup> Further, while the definition of “critical habitat” in the ESA makes it clear that critical habitat can be either occupied by the species in question (“the specific areas within the geographical area occupied by the species”)<sup>39</sup> or unoccupied (“outside the geographical area occupied by the species” but “essential for the conservation of the species”),<sup>40</sup> some uncertainty remains regarding which regions outside of the

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<sup>34</sup> *Id.* (citing *Arizona Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010) (9th Circuit upholding summary judgment in favor of FWS against challenge that designation failed to adequately consider economic impacts), and *Otay Mesa Prop., L.P. v. U.S. Dep’t of Interior*, 646 F.3d 914, 918 (D.C. Cir. 2011) (D.C. Circuit finding insufficient evidence to support critical habitat designation for San Diego fairy shrimp)).

<sup>35</sup> *See id.* at 216–17 (discussing disparate interpretations of which geographic areas can be considered “critical habitat”).

<sup>36</sup> 16 U.S.C. § 1532(5)(A).

<sup>37</sup> *Murphy, D.D. & Noon, B.R., Exorcising ambiguity from the Endangered Species Act: critical habitat as an example*, *Endangered Species UPDATE* 8(12):6 (1991) (“[D]espite ... significant scientific input, the Endangered Species Act remains couched in language that is, well, unscientific.”).

<sup>38</sup> *See J.B. Ruhl, What Is Habitat?*, *Nat. Resources & Env’t*, Summer 2019, at 52–53.

<sup>39</sup> 16 U.S.C. § 1532(5)(A)(i).

<sup>40</sup> 16 U.S.C. § 1532(5)(A)(ii).

geographical areas currently occupied or inhabitable by the species may reasonably be designated as unoccupied critical habitat.<sup>41</sup>

Of particular concern for conservation is whether areas that are unoccupied and uninhabitable in their current form, but which may become habitable at some point in the future, can legitimately be designated as “critical habitat” under the ESA. Such unoccupied areas could exist in several different forms, some of which seem more likely to fall under the statutory definition of “critical habitat” than others.<sup>42</sup> For instance, an area that is currently unoccupied and unlikely to become habitable without a clearly impractical or unrealistic degree of intervention, such as the site of an important federal building in an urban setting, seems to fall outside the ESA’s definition of “critical habitat”.<sup>43</sup> On the other hand, it is plausible that some areas which are currently unoccupied and uninhabitable for a given species may become habitable in the relatively near future, either through deliberate interventions like restoration projects or as a result of non-deliberate processes—for instance, the effects of climate change, such as warmer temperatures and sea level rise in certain regions, could cause the habitable range

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<sup>41</sup> See Ruhl, *What Is Habitat?*, *supra* note 38, at 53 (“[A]ny definition of habitat for purposes of the ESA must accommodate the possibility that unoccupied areas can be habitat ... [t]he question thus boils down to the conditions under which unoccupied areas can qualify as habitat of a species.”). The uncertainty here lies in the fact that the scope of unoccupied areas designable as habitat can be read either broadly or narrowly. See, e.g. Kalyani Robbins, *Recovery of an Endangered Provision: Untangling and Reviving Critical Habitat Under the Endangered Species Act*, 58 Buff. L. Rev. 1095, 1105 (2010) (“It stands to reason that a species that has diminished to the point of listing under the ESA is going to occupy a smaller habitat than it did when it was doing well. Naturally, if our goal is to recover the species to its prior condition, it will be necessary to protect some of its former habitat as well as that which it currently occupies. That Congress acknowledged this need is evident from the fact that it provided for designation of unoccupied critical habitat.”); Norman D. James & Thomas J. Ward, *Critical Habitat’s Limited Role Under the Endangered Species Act and Its Improper Transformation into “Recovery” Habitat*, 34 J. Envtl. L. 1, 31 (2016) (“The deliberate distinction between occupied and unoccupied areas shows that the role of critical habitat under the ESA is limited—it is not intended to provide habitat for a species’ population expansion, i.e., for recovery.”).

<sup>42</sup> See Ruhl, *What Is Habitat?*, *supra* note 38, at 53.

<sup>43</sup> See *id.*

for some listed species to expand into geographic areas which were previously uninhabitable.<sup>44</sup> Because of their closer relationship to *potential* habitability, unoccupied and uninhabitable areas of this type can more reasonably be seen as within the scope of “critical habitat” as defined in the ESA.

Even within these categories, there exist gray areas for interpretation. For instance, if an area could potentially become inhabitable as a result of restoration efforts, is it necessarily “critical habitat,” or is there a certain threshold in terms of time and expense beyond which the restoration would be so impractical, expensive, or otherwise burdensome that the area should still not be considered “critical habitat?” If the latter is true, the interpretation of “critical habitat” in terms of critical habitat designations may create problems when it comes to determining the degree of restoration required for habitability:<sup>45</sup> permanently converting an area to an artificial greenhouse would clearly be excessive, but the wide geographic and biological variety across different areas that could potentially be designated as critical habitat seems to preclude any bright-line tests that could distinguish between feasible and infeasible restoration projects as a matter of cost or effort. Similarly, the degree of likelihood of a given area becoming inhabitable as a result of climate change or other non-deliberate processes could raise line-drawing problems of its own; are only those areas which are very likely to become inhabitable by a given species

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<sup>44</sup> See generally Louis Iverson & Don Mckenzie, U.S. Dept. of Agriculture, Forest Service, Climate Change Resource Center, *Species Distribution and Climate Change* (2014), <https://perma.cc/8CVZ-NMWC>. Some past critical habitat designations by the Services have already taken the effects of these phenomena on population distribution into account when determining which areas are essential for the conservation of listed species. See, e.g., Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Preble’s Meadow Jumping Mouse (*Zapus hudsonius preblei*), 68 Fed. Reg. 37,276, 37,285 (June 23, 2003) (codified at 50 C.F.R. pt. 17) (designating areas along mountain streams as critical habitat because “Preble’s populations along mountain streams may be less subject to certain threats including water projects, residential development, flooding, and long-term climate change.”).

<sup>45</sup> Although the Supreme Court did not address these line-drawing questions in its *Weyerhaeuser* opinion, Chief Justice Roberts raised them at oral argument. Oral Argument Transcript at 29, *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, 139 S. Ct. 361 (No. 17-71), <https://perma.cc/6YD7-S8SY>.

“critical habitat,” or could any area with a chance of future inhabitability as a result of climate change be designated?

Many of these thorny interpretive questions have already been raised a variety in real-world circumstances, such as whether critical habitat may be designated in areas which, though uninhabitable, could still be considered “essential to the conservation of the species” in the sense that they provide or maintain some ecological factor crucial to the species’ survival elsewhere, like the hydrological qualities of a river in which a listed species lives downstream.<sup>46</sup> Several different interpretive approaches attempting to address these questions have been put forth by various parties, legal scholars, and administering agencies (as discussed in section IV *infra*), but no single interpretation of “critical habitat” has attained widespread acceptance or reached the level of consistent agency practice.<sup>47</sup> Given this context, the Supreme Court’s grant of certiorari in *Weyerhaeuser* presented an opportunity for the Court to resolve—or at least to address with authority—some of the pernicious interpretive puzzles surrounding the role of “critical habitat” designations in the ESA.

## **II. Weyerhaeuser Co. v. U.S. Fish & Wildlife Service**

### **A. Background of the Case**

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<sup>46</sup> See Ruhl, *What Is Habitat?*, *supra* note 38, at 53 (quoting U.S. Fish & Wildlife Serv. and Nat’l Marine Fisheries Serv., *Endangered Species Consultation Handbook* at xix (1998) (“Some designated, unoccupied habitat may never be occupied by the species, but was designated since it is essential for conserving the species ... [f]or example, critical habitat may be designated for an upstream area maintaining the hydrology of the species’ habitat downstream.”)).

<sup>47</sup> *Id.* at 53 (“FWS and NMFS have never defined habitat in a way that could be deemed an exercise of agency discretion worthy of judicial deference.”).

The “critical habitat” in question in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service* is the FWS’ designation of the critical habitat of *Rana sevosa*—the dusky gopher frog, also referred to as the Mississippi gopher frog.<sup>48</sup> As a species, the dusky gopher frog is endangered primarily as a result of the loss of its natural living conditions: the upland longleaf pine forests which are best suited to habitation by the frog once extended across several states, but these forests have been almost completely destroyed over the last several decades due to the regional expansion of urban development, agriculture, and the timber industry, putting the frog at critical risk of extinction.<sup>49</sup> However, when the dusky gopher frog was first listed as an endangered species by the FWS in 2001, the agency did not designate its critical habitat.<sup>50</sup> This state of affairs—the dusky gopher frog being listed as an endangered species, but lacking an official designation of critical habitat—lasted until 2010, when the FWS published its first proposed designation of the frog’s critical habitat.<sup>51</sup>

The FWS’ initial critical habitat designation included the areas which were currently inhabited by the dusky gopher frog.<sup>52</sup> However, because this range was geographically limited enough to make the species extremely vulnerable to even localized instances of disease or drought, the FWS determined that designating only the frog’s existing range as critical habitat was not sufficient to protect the species from the risk of extinction.<sup>53</sup> Therefore, in keeping with its policy for designating unoccupied areas as critical habitat, the FWS also proposed to

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<sup>48</sup> 139 S. Ct. 361, 364–65 (2018) (citing Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35129–35131 (2012) (to be codified at 50 C.F.R. pt. 17)).

<sup>49</sup> See *id.* at 365.

<sup>50</sup> *Id.* at 366.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* (citing Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31394 (2010) (to be codified at 50 C.F.R. pt.17)).

<sup>53</sup> *Id.*

designate a nearby area, “Unit 1,” which had historically been occupied by the frog and which, though currently unoccupied and uninhabitable, could be restored to a condition of habitability with “reasonable effort”.<sup>54</sup> The FWS’ proposal noted that, if Unit 1 was returned to habitability and its dusky gopher frog population reintroduced, the resulting expansion of the species and creation of a new population center would significantly decrease the risk of the species’ extinction and increase the chances of its eventual recovery.<sup>55</sup>

This proposed designation was contested by Weyerhaeuser Company, a timber company which owned land in Unit 1, along with a group of family landowners who also owned property in the area.<sup>56</sup> Although a critical habitat designation would not interfere with these private parties’ existing operations or land use, Weyerhaeuser and the other owners were concerned that the designation of Unit 1 as critical habitat would interfere with their ability to profitably develop the land in the future.<sup>57</sup> For instance, future development plans might require the landowners to seek Clean Water Act permits before filling in wetlands; because issuing these permits would constitute federal action, the ESA would require the issuing agency (the Army Corps of Engineers) to consult with the FWS beforehand.<sup>58</sup> As discussed in section I(A) *supra*, this Section 7 consultation process could significantly alter the types of development possible or even block certain types of development outright if the FWS determined that the action would

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<sup>54</sup> *Id.* (quoting Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35129, 35135 (2012) (to be codified at 50 C.F.R. pt.17)); *see also* 75 Fed. Reg. 31394, 31390 (“we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed only when we determine that the best available scientific data demonstrate that those areas are essential for the conservation of the species.”) (citing 50 C.F.R. 424.12).

<sup>55</sup> Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35129, 35135 (2012) (to be codified at 50 C.F.R. pt.17).

<sup>56</sup> *Weyerhaeuser*, 139 S. Ct. 361, 367.

<sup>57</sup> *See id.*

<sup>58</sup> *See id.* (citing 33 U.S.C. § 1344(a)).

jeopardize the species' critical habitat, which, in turn, would significantly reduce the landowners' ability to economically exploit their land.<sup>59</sup>

In keeping with its statutory obligations under the ESA, the FWS considered this economic impact in making its initial proposal to designate Unit 1 as critical habitat; a report commissioned by the FWS estimated that the effective cost to Weyerhaeuser and the other owners if development were blocked could be as high as \$33.9 million.<sup>60</sup> Assessing this information and taking the economic impact into account, FWS chose not to exclude Unit 1 from critical habitat designation, finding that the conservation benefits of designating the area as critical habitat for the dusky gopher frog were not outweighed by the potential economic impact on affected parties.<sup>61</sup>

Weyerhaeuser Co. and the other landowners challenged this decision, arguing that the FWS "had failed to adequately weigh the benefits of designating Unit 1 against the economic impact ... had used an unreasonable methodology for estimating economic impact and ... had failed to consider several categories of costs."<sup>62</sup> More consequentially, the landowners also challenged the FWS' designation of Unit 1 as critical habitat as a matter of statutory interpretation, arguing that the area in question could not be reasonably designated as "critical habitat" because it was not currently habitable by the dusky gopher frog and could not foreseeably become habitable without significant alterations such as "replacing the closed-canopy timber plantation encircling the ponds with an open-canopy longleaf pine forest".<sup>63</sup> Therefore, because Unit 1 was not currently habitable by the frog, could not be inhabited by the

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 362 (citing Indus. Econ., Inc., Final Economic Analysis Report at 67–70 (Apr. 6, 2012)).

<sup>61</sup> *Weyerhaeuser*, 139 S. Ct. 361, 367.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

frog without restoration, and did not otherwise support the species at the time of the proposed designation, the landowners argued that the area could not rationally be interpreted as falling within the category of critical habitat which is “essential for the conservation of the species” as defined in the ESA.<sup>64</sup>

The District Court upheld FWS’ critical habitat designation against this challenge, and the Fifth Circuit Court of Appeals affirmed.<sup>65</sup> The Fifth Circuit found that, as an act of agency discretion, the FWS’ decision not to exclude Unit 1 from its critical habitat designation was not reviewable, given that the FWS had adequately satisfied its statutory obligations both to designate critical habitat and to take the economic impact of its critical habitat designation into account.<sup>66</sup>

With regard to the statutory interpretation question, the Fifth Circuit’s analysis turned on the definition of unoccupied critical habitat in the ESA, particularly the term “essential” in the statutory definition of unoccupied critical habitat.<sup>67</sup> Because the ESA did not include a statutory definition of “essential”, the Fifth Circuit found that the FWS had the implicit authority to interpret the term,<sup>68</sup> further, because the critical habitat designation in question was an official agency rule issued through the notice & comment process, the Fifth Circuit found that *Chevron* deference applied to the FWS’ reasonable interpretation of the term.<sup>69</sup> Therefore, according to

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<sup>64</sup> See *Markle Ints., L.L.C. v. United States Fish & Wildlife Serv.*, 827 F.3d 452, 467 (5th Cir. 2016) (quoting 16 U.S.C. § 1532(5)(A)(ii)).

<sup>65</sup> *Markle Ints., LLC v. United States Fish and Wildlife Serv.*, 40 F.Supp.3d 744 (E.D. La. 2014); *Markle*, 827 F.3d 452.

<sup>66</sup> See *Markle*, 827 F.3d 452, 473–74 (“The Service argues that once it has fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court. The Service is correct.”) (citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (discussing unreviewable agency discretion in general); *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 989–90 (9<sup>th</sup> Cir. 2015) (finding that agency’s decision *not* to exclude a given area from a critical habitat designation is unreviewable)).

<sup>67</sup> See *id.* at 467.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 467–68 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–844 (1984)).



the Fifth Circuit, “[t]he question presented ... is whether the Landowners have demonstrated that the Service interpreted the ESA unreasonably when it deemed Unit 1 ‘essential’ for the conservation of the dusky gopher frog.”<sup>70</sup> The Fifth Circuit rejected both of the landowners’ challenges to the FWS’ designation of Unit 1, finding that neither the term “essential” nor the definition of “critical habitat” in the ESA required current habitability and, therefore, that the FWS did not interpret the ESA unreasonably when it chose to designate Unit 1 as critical habitat.<sup>71</sup>

The Fifth Circuit declined to rehear the case en banc.<sup>72</sup> Judge Jones, joined by five other judges, dissented.<sup>73</sup> These judges’ dissent, like the Fifth Circuit’s opinion, focused on the statutory construction of “critical habitat” in the ESA; however, the dissent’s analysis turned on the statutory definition of the term “habitat” rather than the term “essential”.<sup>74</sup> In this interpretation, the structure of the ESA and the ordinary meaning of “habitat” create an implied limit on the areas that can be designated as “critical habitat” for a listed species; because the critical-habitat designation process set out in § 1533 of the ESA requires the Services to “designate any habitat of such species which is then considered to be critical habitat”, the dissent argues, only areas which are themselves “habitat” can reasonably be designated as “critical habitat”.<sup>75</sup> Because the ESA does not include a definition of “habitat” as a standalone term, the dissenting judges turned to the ordinary meaning and dictionary definitions of the word, arguing that the conventional meaning of “habitat” implies that a species normally lives or is found in the

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<sup>70</sup> *Id.* at 468.

<sup>71</sup> *Id.* at 468–69. (“The statute requires the Service to designate ‘essential’ areas, without further defining ‘essential’ to mean ‘habitable.’”).

<sup>72</sup> *Markle Interests, LLC v. United States Fish and Wildlife Serv.*, 848 F.3d 635 (2017).

<sup>73</sup> *Id.* at 636.

<sup>74</sup> *See id.* at 639–40.

<sup>75</sup> *See id.* at 640–41 (quoting 16 U.S.C. § 1533(a)(3)(A)(i)–(ii)).

given area and, therefore, that a designation as “habitat” requires current habitability.<sup>76</sup> Because of this implicit habitability requirement, the dissent argued, the Fifth Circuit panel majority’s conclusion that “critical habitat” did not require current habitability was at odds with the plain language of the ESA.<sup>77</sup>

The landowners moved to appeal the Fifth Circuit’s holding; the Supreme Court granted their petition for certiorari.<sup>78</sup>

### B. Supreme Court’s Statutory Analysis

The Supreme Court’s unanimous opinion in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service* (albeit not joined by Justice Kavanaugh, who had been sworn in shortly beforehand and therefore took no part in the case),<sup>79</sup> written by Chief Justice Roberts, took a distinctly different approach to the fundamental question of statutory interpretation at the core of the dispute than the prevailing opinions in the lower courts had: rather than focusing its discussion of the ESA’s statutory text on the term “essential”, as the Fifth Circuit panel majority had, the Supreme Court’s opinion turned on the definition of the term “habitat” itself. As Chief Justice Roberts framed the statutory interpretation issue in question, “we granted certiorari to consider ...

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<sup>76</sup> See *id.* at 641 (citing Webster’s Third New International Dictionary 1017 (1961) (“[T]he place where a plant or animal species naturally lives and grows.”); The Random House Dictionary of the English Language 634 (1969) (“[T]he kind of place that is natural for the life and growth of an animal or plant[.]”); Habitat, Black’s Law Dictionary (10th ed. 2014) (“The place where a particular species of animal or plant is normally found.”)).

<sup>77</sup> *Id.* at 643–44 (“Erroneously, the panel majority begin and end with the definition of critical habitat, asking only whether the land in question—even if uninhabitable by the species—satisfies the definition. That reasoning is fundamentally at odds with the ESA’s text, properly read, and its regulations.”).

<sup>78</sup> *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 138 S. Ct. 924 (2018).

<sup>79</sup> *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 372 (2018); Press Release, White House, The Honorable Brett M. Kavanaugh officially sworn in as the 114th Justice of the Supreme Court of the United States (Oct. 9, 2018), <https://trumpwhitehouse.archives.gov/briefings-statements/honorable-brett-m-kavanaugh-officially-sworn-114th-justice-supreme-court-united-states/>.

whether ‘critical habitat’ under the ESA must also be habitat’.<sup>80</sup> Like Judge Jones’ dissent from the Fifth Circuit’s denial of rehearing, the Supreme Court’s opinion interpreted the term “habitat” to impose a restraint on the term “critical habitat”, referencing both the text and the structure of the ESA to conclude that the plain-language meaning of “habitat” serves to constrain the range of reasonable interpretations of the statutorily defined term “critical habitat”.<sup>81</sup> In the Supreme Court’s analysis,

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.<sup>82</sup>

This grammatically formalistic approach to textual analysis informs the Court’s interpretation of “critical habitat” in the context of the ESA. Although the Supreme Court considered arguments in intervenor-respondents’ briefs that the statutory definition of “critical habitat”, together with agency regulations, provided an adequate definition for the purposes of critical habitat designation—and that it was therefore unnecessary to read any additional terms into the definition of “habitat”<sup>83</sup>—the Court concluded that the definition of “critical habitat” did not also serve to define “habitat” in the context of the ESA: “the statutory definition of “critical habitat” tells us what makes habitat ‘critical,’ not what makes it ‘habitat.’”<sup>84</sup>

On similar interpretive grounds, the Court read the ESA’s creation of a statutory obligation to designate “any habitat of such species” as critical habitat as an implicit structural limitation on the types of areas which can be reasonably designated as critical habitat: “[o]nly the

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<sup>80</sup> *Weyerhaeuser*, 139 S. Ct. 361, 368.

<sup>81</sup> *See id.* at 368.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (citing Brief for Intervenor-Respondents at 43–49, *Weyerhaeuser*, 139 S. Ct. 361 (No. 17-71)).

<sup>84</sup> *Id.*

‘habitat’ of the endangered species is eligible for designation as critical habitat ... [the ESA] does not authorize the Secretary to designate the area as critical habitat unless it is also habitat for the species.”<sup>85</sup> Following this line of reasoning, the Court determined that an area like Unit 1 could only be designated as “critical habitat” if it could also be interpreted as “habitat” in the conventional meaning of the term. While the Court recognized that “critical habitat” need not currently be occupied or inhabited by the species in question, it held that, for an area to be designated as critical habitat, it must currently exist in a state that could reasonably be described as “habitat.”<sup>86</sup> Having thereby concluded that “critical habitat” must meet the ordinary-language definition of “habitat” as well as the definition of “critical habitat” set out in the ESA, the Court went on to discuss the parties’ arguments regarding whether areas like Unit 1 could be designated as critical habitat.<sup>87</sup>

In briefs submitted to Court, both Weyerhaeuser and the FWS had addressed the interpretive question of whether Unit 1 could be defined as “habitat” for the dusky gopher frog. Weyerhaeuser’s brief cited a range of dictionary definitions and other conventional uses of “habitat” contemporary with the ESA, arguing that “[t]hose definitions do not cover Unit 1, where suitable living conditions do not exist and the frog cannot naturally survive.”<sup>88</sup> Because the conditions under which the dusky gopher frog had formerly inhabited the area, such as the presence of open canopy and herbaceous ground cover, no longer existed, the petitioners argued that the area could no longer be considered “habitat” due to its not being habitable in its present

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<sup>85</sup> *Id.* (citing 16 U.S.C. § 1533(a)(3)(A)(i)).

<sup>86</sup> *Id.* at 369.

<sup>87</sup> *Id.*

<sup>88</sup> Brief for Petitioner at 24, *Weyerhaeuser*, 139 S. Ct. 361 (No. 17-71).

form: “[i]f dusky gopher frogs were moved to Unit 1, they would not survive. No reasonable definition of ‘habitat’ includes this land.”<sup>89</sup>

On a factual level, the FWS’s brief disputed Weyerhaeuser’s characterization of Unit 1 as uninhabitable, noting that the dusky gopher frog likely could live and breed in several areas of Unit 1 as they currently exist.<sup>90</sup> On an interpretive level, the FWS argued against Weyerhaeuser’s narrow definition of “habitat”, stating that “a species’ ‘habitat’ is not limited to areas that simultaneously provide optimal conditions for every stage of a species’ life cycle.”<sup>91</sup> Pointing to the practical and scientific challenge of creating a bright-line definition of “habitat” applicable to the wide variety of areas and species covered by the ESA, the FWS argued that, even in the conventional understanding of the term “habitat”, a reasonable interpretation of “habitat” as the term is situated in the statutory context of the ESA would still include certain areas that could not currently be inhabited by the species.<sup>92</sup> To support this claim, the FWS cited a range of examples of areas which have been referred to as “habitat” in common usage despite not being habitable at all times, such as areas that a species only relies on for a temporary phase in its migration or life cycle,<sup>93</sup> “marginal” areas that cannot support a species in the long term but which provide a buffer zone from other harms, and areas that are uninhabitable but essential to the species’ survival in other ways, like preserving water quality for species which live downstream.<sup>94</sup> The FWS also argued that the expansive phrase “any habitat” in the ESA’s statutory authorization to

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<sup>89</sup> *Id.* at 25.

<sup>90</sup> Brief for the Federal Respondents at 20–22, *Weyerhaeuser*, 139 S. Ct. 361 (No. 17-71) (“[FWS] also found that Unit 1 contained ‘terrestrial habitat’ in which adult frogs could live ... Unit 1 contained, albeit with varying degrees of quality, the basic elements of ‘habitat’ required during the dusky gopher frog's life cycle.”).

<sup>91</sup> *Id.* at 26.

<sup>92</sup> *See id.* at 29–30.

<sup>93</sup> *Id.* at 29 (citing e.g. nesting habitat for turtles, spawning habitat for fish, winter habitat for migratory elk).

<sup>94</sup> *See id.* at 29–30.

designate critical habitat,<sup>95</sup> as well as statutory and judicial precedent supporting the definition of inaccessible and intermittently habitable areas as “habitat” in the conventional use of the term,<sup>96</sup> weighed in favor of a relatively broad interpretation of the definition of “habitat” for the purposes of critical habitat designations.

Ultimately, the Supreme Court did not reach a conclusion addressing either the definition of “habitat” in the ESA or the propriety of the FWS’ conclusions with regard to Unit 1; although the Court vacated the Court of Appeals’ holding, Chief Justice Roberts noted that the question of how the standalone term “habitat” may be interpreted in the context of the ESA was remanded for the Fifth Circuit to consider in the first instance, and the Supreme Court’s opinion did not explicitly address the question of whether currently uninhabitable land like Unit 1 could permissibly be designated as critical habitat.<sup>97</sup> However, at oral argument, Chief Justice Roberts expressed concern about the lack of a clear threshold of restorability that could cause a currently uninhabitable area to qualify as “critical habitat” under the FWS’ interpretation, as well as the potential for overreach in terms of the amount of potential restoration needed in order to make the area inhabitable.<sup>98</sup>

Perhaps as a result of these concerns, the Supreme Court’s approach to the statutory interpretation question at the core of the issue cuts against the expansive, technical approach to defining habitat proposed by the FWS.<sup>99</sup> By reading “habitat” as a restriction on the statutorily

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<sup>95</sup> *Id.* At 28–29 (quoting 16 U.S.C. § 1533(a)(3)(A)(i)) (citing *United States v. Gonzales*, 520 U.S. 1, 5 (1997)).

<sup>96</sup> *Id.* at 29 (“This Court and other courts have frequently used the term ‘habitat’ to describe areas that a species uses only seasonally or for one purpose, even though it does not contain every feature necessary for a species’ existence.”).

<sup>97</sup> *Weyerhaeuser*, 139 S. Ct. 361, 369.

<sup>98</sup> *See* Oral Argument Transcript at 29, *Weyerhaeuser*, 139 S. Ct. 361 (No. 17-71), <https://perma.cc/6YD7-S8SY> (“[I]f you have the ephemeral ponds in Alaska, you could build a giant greenhouse and plant the longleaf pines and ... the frog could live there ... there has to be presumably some limit on what restoration you would say is required.”).

<sup>99</sup> *See Weyerhaeuser*, 139 S. Ct. 361, 369.

defined term “critical habitat”, the Supreme Court used the same interpretive framework that led the dissenting Fifth Circuit judges to conclude that only currently habitable areas can reasonably be defined as “critical habitat”, even though the Court did not explicitly endorse the dissenting judges’ ultimate conclusions or make any conclusions of its own about the permissible definitions of “habitat”.<sup>100</sup> The interpretive approach that the Supreme Court used in *Weyerhaeuser* is not necessarily the same approach the Court would take in reviewing a future case on the same subject matter, given both the changes to the Court’s makeup since 2018 and the fact that the *Weyerhaeuser* opinion did not ultimately create any specific definition; this lack of binding effect, along with the limited holding of the opinion, may explain how the Court was able to reach a unanimous result.<sup>101</sup> However, by finding that the question of whether a given area is “habitat” is prior to the question of whether it is “essential” for the purposes of critical habitat designation,<sup>102</sup> the Court seems to implicitly foreclose the possibility that an area could be designated as “critical habitat” without being currently habitable to at least the extent implied by the plain-language meaning of “habitat”.

If applied to subsequent cases, this approach may effectively serve to reintroduce the implicit “habitability requirement” that the Fifth Circuit panel majority rejected. In this sense, although the Supreme Court’s opinion does not overrule the FWS’ interpretation of “habitat” or require the Services to interpret the term in any particular way,<sup>103</sup> it suggests an approach to statutory interpretation that plainly cuts against the broader, more technical definition of

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<sup>100</sup> See *id.* at 368; *Markle*, 848 F.3d 635, 640–41.

<sup>101</sup> See Rylander et al., *supra* note 13, at 10,532 (“the *Weyerhaeuser* Court opined that ‘critical habitat’ must first be ‘habitat,’ but it did not attempt to define exactly what habitat is . . . [t]he Court also sidestepped whether currently unoccupied ‘habitat’ must in fact be ‘habitable’ at the time of designation as critical habitat.”).

<sup>102</sup> *Weyerhaeuser*, 139 S. Ct. 361, 369 n. 2 (“It is not necessary to consider the landowners’ argument that land cannot be ‘essential for the conservation of the species,’ and thus cannot satisfy the statutory definition of unoccupied critical habitat, if it is not habitat for the species.”).

<sup>103</sup> See *id.* at 368–69.

“habitat” that the FWS advanced in *Weyerhaeuser*. This approach would likely bar many areas which are currently uninhabitable from being designated as “critical habitat”, even if they are crucial for the conservation and recovery of a vulnerable species—an unfortunate outcome for species like the dusky gopher frog that no longer possess enough habitable land to avoid extinction.

### C. Potential Implications of Supreme Court’s Approach

While the consequences of *Weyerhaeuser* for critical habitat designations under the ESA are significant in their own right, the Supreme Court’s reasoning in this case is also understandable as one part of a few larger patterns in the Court’s modern jurisprudence. In *Weyerhaeuser* and in more recent cases like *West Virginia v. Environmental Protection Agency*, the Court has increasingly engaged in a more critical review of federal agencies’ statutory interpretations than the deferential *Chevron* framework used by the Court in the past and applied by the Fifth Circuit in *Weyerhaeuser* itself.<sup>104</sup> Further, the analysis the Court brings to the statutory interpretation problem in *Weyerhaeuser* is familiar: over the course of the last several decades, the Court has increasingly used textualism-influenced interpretive methods to read the ordinary meanings of statutorily undefined terms to limit the reach of federal agencies’ statutory mandates, particularly when it suspects overreach by the administering entities, is wary of the potential for institutions to act to increase their own jurisdiction, or perceives a general lack of

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<sup>104</sup> *Markle Ints., L.L.C. v. United States Fish & Wildlife Serv.*, 827 F.3d 452, 467 (5th Cir. 2016) at 467–68 (Fifth Circuit applying *Chevron* in *Weyerhaeuser*); see *West Virginia*, 142 S. Ct. 2587 (2022) at 2634–36 (describing a recent line of cases where the Court chose not to apply *Chevron* as a way of “responding to something the Court found anomalous—looked at from Congress’s point of view—in a particular agency’s exercise of authority.”) (Kagan, J., dissenting).



adequate limiting principles on the statutory grant of authority. In recent years, the Court has repeatedly engaged in this particular form of analysis with regard to environmental statutes.

For example, in the Supreme Court’s recent denial of certiorari in *Massachusetts Lobstermen’s Association v. Raimondo*,<sup>105</sup> the Court expressed skepticism regarding the propriety of the use of the Antiquities Act—which allows the President to declare “landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” on federal land as national monuments and thereby designate them for conservation<sup>106</sup>—to declare a national monument consisting of an underwater area and ecosystem. In the Court’s statement respecting its denial of certiorari in *Massachusetts Lobstermen’s Association*, Chief Justice Roberts expressed concern that the Antiquities Act, “[a] statute permitting the President ... to designate as monuments ‘landmarks,’ ‘structures,’ and ‘objects’ ... has been transformed into a power without any discernible limit to set aside vast and amorphous expanses of terrain above and below the sea.”<sup>107</sup> By suggesting that the conventional understanding of the terms “landmarks,” “structures,” and “objects” should constrain the range of subjects which may appropriately be designated as national monuments under the Antiquities Act, the Supreme Court’s denial of certiorari in *Massachusetts Lobstermen’s Association* seems to be taking an interpretive approach similar to its reasoning in *Weyerhaeuser* that the term “habitat” should be read to constrain the range of areas which may be designated as “critical habitat”.<sup>108</sup>

As with the constraints on critical habitat designations contemplated in *Weyerhaeuser*, the constraints that the Supreme Court contemplates on national monument declarations in

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<sup>105</sup> 141 S. Ct. 979, 980 (2021).

<sup>106</sup> 54 U.S.C. § 320301(a).

<sup>107</sup> 141 S. Ct. 979, 981.

<sup>108</sup> See *id.*; *Weyerhaeuser*, 139 S. Ct. 361, 368–69.

*Massachusetts Lobstermen's Association* would significantly restrict the scope of the relevant statute. This method of interpretation may serve as a check on the overuse of statutory powers that would otherwise be “without any discernible limit”, but it also creates a potentially severe restriction on the Antiquities Act’s utility for the purposes of conservation.<sup>109</sup>

This approach to statutory interpretation with regard to conservation statutes has risen to prominence on the Supreme Court in concert with the Court’s overall turn toward textualism as its most favored tool of statutory analysis.<sup>110</sup> In particular, Justice Scalia’s plurality opinion in *Rapanos v. U.S.* seems to have provided a model for the approach the Court went on to take in both *Weyerhaeuser* and *Massachusetts Lobstermen's Association*. In *Rapanos*, the Supreme Court addressed the scope of administering agencies’ jurisdiction to protect the “waters of the United States” as set forth by the Clean Water Act (CWA).<sup>111</sup> The agencies in question, the Army Corps of Engineers and the Environmental Protection Agency (EPA), interpreted the “waters of the United States” through a series of technical regulations, finding that the term extended to intrastate navigable waters, tributaries of those waters, and adjacent wetlands, including bodies of water whose connection to interstate navigable waters was intermittent or which were themselves ephemeral (e.g. only existing during flood conditions).<sup>112</sup> Justice Scalia’s plurality opinion rejected this expansive conception of “waters of the United States,” arguing that the meaning of the term “waters” ruled out the agencies’ interpretation of the term “waters of the United States”:

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<sup>109</sup> *Massachusetts Lobstermen's Association*, 141 S. Ct. 979, 981 (“The scope of the objects that can be designated under the Act, and how to measure the area necessary for their proper care and management, may warrant consideration—especially given the myriad restrictions on public use this purely discretionary designation can serve to justify.”).

<sup>110</sup> See generally Remarks of Judge Diarmuid F. O'Scannlain, “*We Are All Textualists Now*”: *The Legacy of Justice Antonin Scalia*, 91 St. John’s L. Rev. 303 (2017).

<sup>111</sup> *Rapanos v. United States*, 547 U.S. 715, 719–24 (2006) (citing 33 U.S.C. § 1362(7)).

<sup>112</sup> *Id.* at 724–26 (citing 33 CFR § 328.3(a) (2004)).

[T]he CWA authorizes federal jurisdiction only over “waters.” ... The only natural definition of the term “waters,” our prior and subsequent judicial constructions of it, clear evidence from other provisions of the statute, and this Court's canons of construction all confirm that “the waters of the United States” ... cannot bear the expansive meaning that the Corps would give it.<sup>113</sup>

The plurality pointed to the dictionary definition of “waters,” holding that the term referred only to “relatively permanent, standing or flowing bodies of water,” and therefore that the “waters of the United States” (and the agencies’ CWA jurisdiction) could not plausibly be interpreted to extend to intermittent or ephemeral bodies of water.<sup>114</sup>

By reading the ordinary meaning of the non-statutorily defined term “waters” to limit the permissible interpretations of the statutory term “waters of the United States,” the approach taken by the plurality in *Rapanos* seems to anticipate the approach that the Court would go on to take in *Weyerhaeuser* and *Massachusetts Lobstermen’s Association*. Further, given that Chief Justice Roberts joined the *Rapanos* plurality in a concurrence which criticized the administering agency for “adher[ing] to its essentially boundless view of the scope of its power”,<sup>115</sup> it seems reasonable to view these cases as announcing a consistent trend in terms of the Supreme Court’s willingness to use statutory interpretation to cut back on perceived overreach by the entities charged with statutory authority.

*Rapanos* also indicates the potential administrative effectiveness that can be lost when an agency’s interpretation of a statutory term like “waters of the United States” is constrained by the meaning of a more general constituent term like “waters.” While the *Rapanos* plurality’s interpretation may be more in line with the dictionary definition of “waters,” privileging the plain-language meaning of a term in this context means that the technical expertise that the

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<sup>113</sup> *Id.* at 731–32 (citing 33 U.S.C. § 1362(7)).

<sup>114</sup> *Id.* at 732, 738–9 (citing Webster’s New International Dictionary 2882 (2d ed.1954)).

<sup>115</sup> *Id.* at 758. (Roberts, C.J., concurring).

administering agencies bring to the interpretation of the term “waters of the United States” is subordinated to the ultimately unscientific ordinary meaning of the term “waters”; by necessity, this conventional meaning fails to reflect the multitude of hydrological relationships that can form between different bodies of water.<sup>116</sup> When the issue at hand is a scientifically complex one, such that the dictionary definition is imperfect or unhelpful as a guide, the approach to statutory interpretation that the Supreme Court adopted in the line of cases from *Rapanos* to *Weyerhaeuser* constitutes a substantial limitation on the ability of conservation statutes like the CWA, Antiquities Act, and ESA to achieve their ultimate statutory purposes.

Despite these potential drawbacks, the Supreme Court shows no intention of diverging from this interpretive philosophy in the near future. In the near term, the practice of constraining statutory terms by invoking the ordinary meaning of their constituent non-statutorily-defined terms may actually become more popular as a result of recent changes in the Court’s composition; for instance, Justice Kavanaugh, who did not participate in *Weyerhaeuser*, recently expressed approval for the approach that Justice Scalia adopted in *Rapanos*, concurring with the Court’s majority opinion in *County of Maui, Hawaii v. Hawaii Wildlife Fund* on the grounds that the majority’s interpretation of the CWA in that case could be justified using plain-language reasoning analogous to the plurality’s logic in *Rapanos*.<sup>117</sup> In this sense, the Supreme Court’s 8-0 opinion in *Weyerhaeuser* may have expressly decided so little not as a matter of judicial

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<sup>116</sup> See, e.g., Brief for the United States at 29, *Rapanos*, 547 U.S. 715 (No. 04-1034) (“Petitioners make no effort to articulate an objective standard for identifying those tributaries whose connection to traditional navigable waters is so ‘remote, tenuous, or intermittent’ as to require their exclusion ... [n]or have petitioners brought forward the sort of scientific evidence that would be necessary to demonstrate that there are classes of tributaries whose degradation ... is unlikely to affect traditional navigable waters downstream, let alone demonstrated that the relevant test could be better applied by a court in determining the scope of federal regulatory jurisdiction than by an agency deciding whether to exercise that jurisdiction.”).

<sup>117</sup> *County of Maui*, 140 S.Ct. at 1478 (“[T]he Court’s interpretation of the Clean Water Act regarding pollution ‘from’ point sources adheres to the interpretation set forth in Justice Scalia’s plurality opinion in *Rapanos v. United States*”).

minimalism, but in order to postpone the issue until a definitive majority on the Court could decide the question more conclusively. In any event, until such a case arises, both the Services and affected parties will need to align their own statutory interpretations with the Court’s approach as expressed in *Weyerhaeuser*.

### **III. Aftermath of Weyerhaeuser**

Although the Supreme Court remanded the questions of how to define “habitat” and whether Unit 1 could permissibly be designated as “critical habitat” to the lower courts,<sup>118</sup> the matters were not decided there; the FWS ultimately entered into a settlement with Weyerhaeuser and the other landowners, vacating the designation of Unit 1 as critical habitat for the dusky gopher frog and removing the possibility of settling either legal question in court.<sup>119</sup> As a result, the impetus to respond to the Supreme Court’s decision in *Weyerhaeuser* fell to the Services, which promulgated a series of proposed rules in response.<sup>120</sup> However, the controversial nature of the proposed rules, along with the shift in agency approaches caused by the transition between the Trump and Biden Administrations, has left the issue unresolved in many respects and subject to future litigation.

#### **A. Trump Administration’s Regulatory Response**

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<sup>118</sup> *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, 139 S.Ct. 361, 369 (2018).

<sup>119</sup> See Jeffrey S. Knighton Jr., *Critical Decisions: The Challenge of Defining Critical Habitat Under the Endangered Species Act*, 9 LSU J. Energy L. & Resources 563, 565 n. 13 (2021) (citing Consent Decree, Markle Interests, LLC v. U.S. Fish & Wildlife Serv., No. 13-cv-234 (E.D. La. July 3, 2019), ECF No. 174, <https://perma.cc/LX95-6Y4X>).

<sup>120</sup> See *id.* at 575–77.

The initial agency response to *Weyerhaeuser* was a final rule issued jointly in 2019 by both the FWS and NMFS, wherein the Services jointly attempted to address the issues raised in *Weyerhaeuser* by limiting the range of unoccupied areas which could be designated as “critical habitat”.<sup>121</sup> As interpreted in the 2019 Final Rule, “at a minimum, an unoccupied area must have one or more of the physical or biological features essential to the conservation of the species in order to be considered as potential critical habitat.”<sup>122</sup> However, the rule did not attempt to define or set out the meaning of the term “habitat” itself,<sup>123</sup> and was the subject of litigation to block its passage due to the perception that it would effectively undermine the ESA.<sup>124</sup>

In 2020, the Services released one proposed rule and one final rule, both of which aimed to define “habitat” for the purposes of critical habitat designation.<sup>125</sup> The 2020 Proposed Rule included two definitions of “habitat”: “[t]he physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas with existing attributes that have the capacity to support individuals of the species” or, alternatively, “[t]he physical places that individuals of a species use to carry out one or more life processes. Habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where the necessary attributes to support the species presently exist.”<sup>126</sup> The 2020 Final Rule, released in the closing weeks of the Trump Administration, defined habitat as “the abiotic and biotic setting that currently or periodically contains the resources and conditions

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<sup>121</sup> *Id.* at 575–76; Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020 (Aug. 27, 2019) (to be codified at 50 C.F.R. pt. 424) [hereinafter 2019 Final Rule].

<sup>122</sup> 2019 Final Rule, *supra* note 121, at 45,022.

<sup>123</sup> *Id.*

<sup>124</sup> *See* Knighton, *supra* note 119, at 576 (citing *California v. Bernhardt*, 460 F. Supp. 3d 875 (N.D. Cal. 2020)).

<sup>125</sup> *Id.*

<sup>126</sup> Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 47,333, 47,335 (proposed Aug. 5, 2020) (to be codified at 50 C.F.R. pt. 424.02) [hereinafter 2020 Proposed Rule].

necessary to support one or more life processes of a species.”<sup>127</sup> As described by the Services, this definition would explicitly block currently-uninhabitable but restorable areas like Unit 1 in *Weyerhaeuser* from being designated as critical habitat: “the definition excludes areas that do not currently or periodically contain the requisite resources and conditions, even if such areas could meet this requirement in the future after restoration activities or other changes occur.”<sup>128</sup>

## B. Biden Administration’s Regulatory Response

The 2020 Final Rule became effective on January 15, 2021, but the incoming Biden Administration announced soon after that it planned to review the previous Administration’s environmental regulations.<sup>129</sup> In 2021, the Services released a proposed rule that would rescind the 2020 Final Rule’s definition of “habitat.”<sup>130</sup> This 2021 Proposed Rule stated that the 2020 Final Rule’s narrow definition of “habitat” was at odds with the principles of restoration included in the ESA’s overall goal of conservation, finding that an interpretation of the term which excluded restorable areas like Unit 1 was “unnecessarily limiting”: “the better reading of the Act is that an area should not be precluded from qualifying as habitat because some management or restoration is necessary for it to provide for a species' recovery.”<sup>131</sup>

Additionally, the 2021 Proposed Rule questioned the 2020 Final Rule’s “one-size-fits-all” approach to habitat, arguing that the “best scientific data” requirement in 16 U.S.C.

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<sup>127</sup> Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 81,411, 81,412 (Dec. 16, 2020) (to be codified at 50 C.F.R. pt. 424.02) [hereinafter 2020 Final Rule].

<sup>128</sup> *Id.* at 81,413.

<sup>129</sup> Knighton, *supra* note 119, at 577 (citing Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021)).

<sup>130</sup> Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 86 Fed. Reg. 59,353, 59,353–55. (Oct. 27, 2021) (to be codified at 50 C.F.R. pt. 424) [hereinafter 2021 Proposed Rule].

<sup>131</sup> *Id.* at 59,354.

§1533(b)(2) of the ESA imposes an obligation to make case-by-case determinations: “relying on the best available scientific data as specified in the Act, including species-specific ecological information, is the best way to determine whether areas constitute habitat and meet the definition of critical habitat for a species.”<sup>132</sup> To that end, the 2021 Proposed Rule would rescind the 2020 Final Rule’s codified definition of “habitat” in favor of an approach which, rather than defining “habitat” via regulation, would leave “habitat” open-ended as a general matter, allowing agencies to determine “habitat” via the best ecological science available—as it relates to the particular species and areas in question—when proposing a critical habitat designation.<sup>133</sup>

In March 2022, the 2021 Proposed Rule was submitted by the FWS for final White House review, with its proposed rescission of the 2020 Final Rule’s definition of “habitat” still in place.<sup>134</sup> The 2021 Proposed Rule quickly became the subject of controversy: ecological advocacy groups petitioned the Services to go further than the terms of the proposed rule, arguing that merely rescinding the Trump Administration’s restrictive regulations will not do enough to protect vulnerable species and uphold the conservation and restoration purposes of the ESA,<sup>135</sup> whereas industry organizations argued in favor of retaining the 2020 Final Rule on the basis that it provides greater predictability and notice to affected parties.<sup>136</sup> In July 2022, the 2021 Proposed Rule completed White House review and was adopted as a final rule, rescinding the 2020 Final Rule without creating a new regulatory definition of “habitat”.<sup>137</sup> Given the

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Michael Doyle, *White House starts key ESA ‘critical habitat’ review*, Greenwire (Mar. 11, 2022), <https://perma.cc/6X4Q-6RPZ>.

<sup>135</sup> *See, e.g., Petition to Strengthen the ESA Implementing Regulations*, Ctr. for Biological Diversity (Mar. 8, 2022), <https://perma.cc/95G7-FX2Y>.

<sup>136</sup> Doyle, *supra* note 134.

<sup>137</sup> Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 87 Fed. Reg. 43,433, 43,434–36. (Jul. 21, 2022) (to be codified at 50 C.F.R. pt. 424).



recurring controversies related to critical habitat designations, it seems very likely that any approach the Services take with regard to ESA interpretation will return the question of “habitat” to the courts as the subject of future litigation.

#### **IV. Alternative Interpretive Approaches to Critical Habitat Designation**

As the court’s opinion in *Weyerhaeuser* and the subsequent regulatory history makes clear, the question of which areas can be designated as critical habitat under the ESA—and, more fundamentally, what approach the Services should take with regard to the statutory interpretation of “habitat” in the context of “critical habitat”—remains unsettled and open to a wide variety of potential answers. This leaves the ESA’s administering agencies in a position of both opportunity and challenge when it comes to the choice of a forward-looking interpretive strategy. Because the Supreme Court did not impose a particular statutory interpretation on the Services, and given that it seems extremely unlikely that Congress will resolve the issue by amending the ESA in the foreseeable future, the question of how to define “habitat” for the purposes of critical habitat designation is up to the FWS and the NMFS.<sup>138</sup> While the Services have a relatively free hand to choose how (and whether) to define “habitat,” each potential interpretive approach carries a distinct set of advantages and disadvantages, both with regard to its potential effectiveness at achieving the ESA’s policy goals and in terms of the likely consequences of judicial review of the Services’ interpretation.<sup>139</sup>

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<sup>138</sup> See Knighton, *supra* note 119, at 591–94 (discussing potential forms a legislative amendment to ESA could take, but concluding that “[c]onsidering contemporary political realities, it is unlikely that Congress will address the statutory pitfalls of the ESA’s critical habitat definition any time soon.”).

<sup>139</sup> See Isabella Kendrick, *Critical Habitat Designations Under the Endangered Species Act in an Era of Climate Crisis*, 121 Colum. L. Rev. 81, 107–08 (2021).

## A. Leaving “Habitat” Undefined

One straightforward approach would be for the Services to simply leave the term “habitat” undefined by regulation, instead interpreting whether a given area is “habitat” on a case-by-case basis when designating critical habitat. As noted in the 2021 proposed rule, the Services made do without a regulatory definition of “habitat” for decades, and the Supreme Court’s decision in *Weyerhaeuser* did not require that the Services release a regulatory definition of “habitat”; therefore, the Services, having rescinded the 2020 final rule’s definition of “habitat,” may decline to promulgate a new definition, effectively returning to the pre-*Weyerhaeuser* status quo.<sup>140</sup> This approach would give the Services greater ability to incorporate the most advanced and appropriate ecological science at the time that critical habitat is designated, which would, in turn, serve both the conservation purposes of the ESA and the Services’ statutory obligation to use the best available science when making critical habitat designations.<sup>141</sup> In particular, leaving “habitat” undefined would avoid the potential setbacks to conservation which could result from an overly restrictive definition of “habitat” that excludes unoccupied areas like the one at issue in *Weyerhaeuser*.<sup>142</sup> Given the geographically and temporally variable nature of habitat—especially in the current era of anthropogenic habitat destruction and climate modification—this wider potential scope would allow the Services to more effectively carry out the ESA’s conservation mandate.<sup>143</sup>

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<sup>140</sup> 2021 Proposed Rule, *supra* note 130, at 59,355.

<sup>141</sup> *Id.* at 59,354.

<sup>142</sup> *See id.*

<sup>143</sup> *See, e.g.* Shannon Roesler, *Agency Reasons at the Intersection of Expertise and Presidential Preferences*, 71 Admin. L. Rev. 491 (2019) (arguing for a “a background, or default, rule requiring FWS to interpret ‘habitat’ with relevant science in mind ... [not] in a static way, but at a ‘landscape scale’ that acknowledges the dynamic nature of habitat and species conservation.”); *see, e.g.* Knighton, *supra* note 119, at 583–86 (discussing interpretation of “habitat” in the context of climate change and shifting biosphere); Kendrick, *supra* note 139, at 107–10 (arguing that

However, the lack of a regulatory definition of “habitat” might also be interpreted by the judiciary as a sign of the Services overstepping their authority by neglecting to define a term that would, if defined, create a significant limit on the scope of their ability to designate critical habitat. If the reviewing court adopts a position analogous to Chief Justice Roberts’ reasoning in his *Rapanos* concurrence, finding that the agencies failed to define an appropriate outer bound to their authority even under the deferential *Chevron* standard of review for agency statutory interpretations,<sup>144</sup> the result could be an outcome which contradicts the Services’ interpretation of the ESA much more harshly than the Supreme Court’s limited decision in *Weyerhaeuser* did. However, while the Services would understandably want to avoid having their interpretation of the ESA overturned by the judiciary, it may be possible to avoid the appearance of unbounded agency authority even without promulgating a regulatory definition of “habitat.”

As a discretionary policy choice, the FWS and NMFS could decline to push the interpretive boundaries of “habitat” when making critical habitat designations with regard to particularly controversial uninhabitable areas, such as when the area is not in or near the current or historical range of the species (or is within the historical range, but has not been occupied by the species for a significant amount of time), the burden required for the area to be made inhabitable through restoration projects is relatively high, or the likelihood of the area being made inhabitable as the incidental result of some other natural or anthropogenic process is low. The Services have arguably taken this approach in the past with regard to unoccupied habitat;<sup>145</sup> some empirical evidence indicates that the majority of species for which critical habitat is

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interpretation of “habitat” should reflect that “habitat is neither temporally static nor spatially homogenous” and that “[h]abitats are variable and constantly in flux”).

<sup>144</sup> See *Rapanos v. United States*, 547 U.S. 715, 758 (2006).

<sup>145</sup> See, e.g., Rylander et al., *supra* note 13, at 10,538.

designated do not have *any* unoccupied habitat included in their critical habitat designation,<sup>146</sup> and the FWS currently notes that unoccupied areas are considered for designation as critical habitat “only ... when the amount of occupied areas would not be enough to ensure conservation”, emphasizing their cautious, two-stage approach to the designation process.<sup>147</sup>

Despite these indications that the Services have been generally cautious about designating unoccupied habitat, the Services have not been universally cautious, and designations of unoccupied habitat that are perceived by the courts as overbroad or unsupported by the facts have been reviewed critically. For instance, the U.S. District Court for the District of Columbia rejected an attempt by the FWS to use unoccupied critical habitat designation as a fallback option when the Service’s designation of the same area as *occupied* critical habitat was found to be defective; the District Court found that “[t]he Service cannot attempt to designate as unoccupied those lands it considers occupied and for which it has failed to make the proper showings required by statute.”<sup>148</sup> On the other hand, courts have afforded the Services more deference in reviewing agency determinations about, e.g., whether a given area is occupied or unoccupied, as long as the decision is reasonably based on the available evidence.<sup>149</sup> Even post-*Weyerhaeuser*, courts have been willing to accept the interpretation of some areas as critical habitat that, like the examples of “dispersal” and “degraded” habitats the FWS noted in its

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<sup>146</sup> *Id.* (“[A]s an empirical matter, the Services rarely designate unoccupied critical habitat. One survey of critical habitat designations between 2003 and 2012 found that ‘unoccupied habitat was included as part of critical habitat for less than one third of the species we considered.’”) (quoting Abbey E. Camaclang et al., *Current Practices in the Identification of Critical Habitat for Threatened Species*, 29 *Conservation Biology* 482, 482–92 (2014)).

<sup>147</sup> See *Critical Habitat*, U.S. FISH & WILDLIFE SERV., <https://perma.cc/S8GN-4PVH>.

<sup>148</sup> *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 123–25 (D.D.C. 2004) (“Agencies must rely on facts in the record ... [t]he Service may not over-designate habitat and rely on Section 7 consultations down the road to sort out its errors.”).

<sup>149</sup> See, e.g., *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1167–68 (9th Cir. 2010) (finding that FWS did not act impermissibly by designating certain areas as occupied critical habitat for Mexican spotted owls, even when occupied status was not a scientific certainty).

*Weyerhaeuser* brief,<sup>150</sup> are not necessarily occupied or inhabitable by the species in question at the time of their designation. For instance, the Arizona District Court recently upheld the FWS' determination that an unoccupied area was critical habitat for the jaguar on the grounds that it had the essential function of *connecting* areas which were occupied or inhabitable.<sup>151</sup>

In this sense, it seems that courts may be skeptical about interpretations of “habitat” which are expansive as a matter of pure statutory interpretation, but more deferential when choices of areas to designate are based in the Services' agency-specific expertise and scientific knowledge. With this background in mind, if the areas designated as critical habitat by the Services are at least intuitively similar to the conventional, plain-language understanding of “habitat,” and the Services' interpretation of the area as critical habitat has a clear scientific basis, courts may be less likely to second-guess the Services' decision-making.<sup>152</sup> However, as the result in *Weyerhaeuser* itself demonstrates, this approach may not yield predictable results.

In *Weyerhaeuser*, the FWS took a cautious approach to designation in terms of procedure and scientific evidence—designating the unoccupied critical habitat in question only after first identifying the occupied critical habitat of the species, determining that the occupied critical habitat was inadequate to protect the species from jeopardy, and reviewing scientific evidence that the features of the unoccupied critical habitat in Unit 1 made the area essential for the purpose of species conservation<sup>153</sup>—but the Supreme Court still expressed skepticism that Unit 1

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<sup>150</sup> See Brief for the Federal Respondents at 29–30, *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018) (No. 17-71)

<sup>151</sup> *Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.*, 441 F. Supp. 3d 843, 872–74 (D. Ariz. 2020) (“Connecting land is essential for genetic diversity, especially in fragmented areas.”) (citing *Fisher v. Salazar*, 656 F. Supp. 2d 1357, 1367 (N. D. Fla. 2009)).

<sup>152</sup> See, e.g. *Rylander et al.*, *supra* note 13, at 10,537 n. 77 (“When examining this kind of scientific determination ... a reviewing court must generally be at its most deferential.”) (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)).

<sup>153</sup> See *Weyerhaeuser*, 139 S. Ct. at 366.

could permissibly be designated as critical habitat as a matter of statutory interpretation.<sup>154</sup> Given the Supreme Court’s holding that whether an area is “habitat” is a necessary requirement that precedes the other factors in critical habitat designation, it seems that case-by-case scientific determinations of whether a given area is “habitat” may still be overturned by the judiciary if they diverge too widely from a common-sense understanding of “habitat.”<sup>155</sup> However, how broad such a divergence must be, particularly in terms of factors such as restorability and proximity to occupiable habitat, remains to be seen; while the degree of restoration required to restore Unit 1 in *Weyerhaeuser* to habitability seems to have unsettled the Supreme Court, other circumstances exist where relatively minimal restoration efforts<sup>156</sup>—or the inadvertent effects of larger processes<sup>157</sup>—would be enough to make an area inhabitable by a listed species.

In this context, if the Services leave “habitat” undefined, avoiding designations which a reviewing court would perceive as overly broad would likely also require the Services to adopt a more cautious case-by-case approach to statutory interpretation, declining to designate areas as critical habitat which do not fall closer to a plain-language understanding of “habitat.” While this approach has many advantages in terms of the Services’ flexibility and ability to respond to changing science, it risks leaving some edge cases unprotected, especially if the judiciary adopts an even more textually restrictive form of statutory analysis going forward.

## B. Defining “Habitat” Broadly

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<sup>154</sup> *Id.* at 368–69.

<sup>155</sup> *Id.* at 363.

<sup>156</sup> See, e.g. R. Kasten Dumroese et al., *Conserving and restoring habitat for Greater Sage-Grouse and other sagebrush-obligate wildlife: the crucial link of forbs and sagebrush diversity*, 16 *Native Plants J.* 277 (2015) (discussing plans to restore greater sage-grouse habitat by planting regionally appropriate native flora).

<sup>157</sup> See J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 88 *B.U. L. Rev.* 1, 36–37 (2008) (discussing potential effects of migration caused by climate change and other anthropogenic factors on critical habitat designation).

Another option would be to promulgate a definition of “habitat” which is broad enough to include areas like the uninhabitable-but-restorable areas at issue in *Weyerhaeuser*. In theory, this approach could satisfy the need for a limiting principle on the potential scope of critical habitat designations while also allowing the Services enough flexibility to effectively carry out their statutory mandate.<sup>158</sup> There also seems to be support in the text of the ESA itself for a broad definition of “habitat”, particularly with regard to the use of the term “any habitat” in the section laying out the obligation to designate critical habitat: “[w]hile it supports the notion that critical habitat is a subset of habitat, the word ‘any’ contemplates a designation from a larger group that is not necessarily uniform. Therefore, the phrase ‘any habitat’ connotes that a species may have multiple habitats that may vary in suitability.”<sup>159</sup>

While a broad definition of “habitat” would not give the Services the same degree of flexibility in case-by-case interpretation as leaving “habitat” undefined, it could conceivably still include uninhabitable areas of the type most relevant to the purposes of the ESA, like *Weyerhaeuser*-style restorable areas or areas which provide essential features for species that live elsewhere.<sup>160</sup> Such a definition could also potentially address other line-drawing problems within critical habitat designations, e.g. the threshold of restoration required for a presently uninhabitable area to be designated as “habitat” or whether a species’ historical range should

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<sup>158</sup> See, e.g. *id.* at 10,536 (proposing a definition of “habitat” that “reflects the best available science, is consistent with the intent of the ESA, and is broad enough to account for species’ needs”); Kendrick, *supra* note 139, at 109–110 (proposing a definition of “habitat” that “match[es] contemporary scientific understanding of the term, comport[s] with the ESA’s plain language, structure, and purpose, and allow[s] the Services greater flexibility in designating critical habitat for species endangered by climate change.”)

<sup>159</sup> Knighton, *supra* note 119, at 586–87.

<sup>160</sup> See, e.g. Rylander et al., *supra* note 13, at 10,536–38 (proposing that “habitat” be defined as “the area or type of site where a species naturally occurs or that it depends on directly or indirectly to carry out its life processes, or where a species formerly occurred or has the potential to occur and carry out its life processes in the foreseeable future”, and arguing that this definition would include uninhabitable areas core to species recovery and preservation.)

weigh in favor of considering a given area to be “habitat,” which could both alleviate courts’ concerns about unbounded agency discretion and give the Services more guidance in future decision-making.

In this context, creating a broad regulatory definition of “habitat” seems like a reasonable compromise with regard to the interpretation of “habitat” in critical habitat designations. However, this approach may be difficult to successfully apply in practice. If a reviewing court applies the more restrictive plain-language approach to statutory interpretation that the line of cases from *Rapanos* to *Massachusetts Lobstermen’s Association* suggests, it may find that a definition of “habitat” which includes currently uninhabitable areas is either unreasonable as a matter of interpretation or inadequate as a limiting principle on the Services’ authority to designate critical habitat.

Further, the concerns that the FWS expressed in its 2021 proposed rule about the limitations of a “one-size-fits-all” definition of “habitat” apply even to a definition designed with flexibility and the best available science in mind.<sup>161</sup> Such a definition is likely to be “either too broad or too narrow to guide designation of areas” as critical habitat, and, even if the definition reflects the best available science at the time it is adopted, “codifying a single definition in regulation could constrain the Services’ ability to incorporate the best available ecological science in the future.”<sup>162</sup> In this sense, even a very broad definition might become counterproductive if the best available science advances beyond its terms.

### C. Defining “Habitat” Narrowly

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<sup>161</sup> See 2021 Proposed Rule, *supra* note 130, at 59,354.

<sup>162</sup> *Id.*



Alternatively, the Services might promulgate a more restrictive definition of “habitat” which, like the 2020 Final Rule, categorically excludes currently uninhabitable areas.<sup>163</sup> In terms of the conservation purpose of the ESA, this option may seem unappealing on its face, given how much it would limit both the Services’ flexibility and the scope of critical habitat designations. However, a few conceivable advantages still make this approach worth some consideration. For one, a restrictive plain-language rule would be more likely to conform to the Supreme Court’s approach to agency statutory interpretations, both in terms of the interpretation of “habitat” in *Weyerhaeuser* and the Court’s preference for clear limiting principles on agencies’ interpretive authority; this alignment could potentially make the Services’ designations less likely to be overturned in the courts.<sup>164</sup>

Limiting the scope of critical habitat designations to areas which are currently habitable might also serve conservation interests, albeit in a somewhat roundabout way. Given that the Services’ resources are finite and that critical habitat designation is a generally controversial and politically unpopular tool,<sup>165</sup> but that designating critical habitat is a mandatory statutory obligation of the Services,<sup>166</sup> a more restrictive interpretation of “habitat” with regard to critical habitat designations could potentially allow the Services to satisfy their statutory obligations by

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<sup>163</sup> 2020 Final Rule, *supra* note 127, at 81,412.

<sup>164</sup> See Section II(C) *supra*.

<sup>165</sup> See Ruhl, *Climate Change and the Endangered Species Act*, *supra* note 157, at 35 (“The critical habitat program has proven quite controversial. In addition to a wave of suits involving missed statutory deadlines for critical habitat designations, ‘both the protection provided by and the analysis required for critical habitat designation are coming under increasing judicial scrutiny.’”) (quoting Murray D. Feldman & Michael J. Brennan, *The Growing Importance of Critical Habitat for Species Conservation*, 16 Nat. Resources & Env’t 88 (2001)); see generally Salzman, *supra* note 9.

<sup>166</sup> 16 U.S.C. § 1533(a)(3)(A)(i).

designating only the *least* controversial areas as “critical habitat,” thereby freeing up agency resources to pursue conservation goals by other means.<sup>167</sup>

To take one example, the Services could potentially allocate their resources in order to use the Section 7 consultation process more vigorously to defend critical habitat in general. Empirical studies indicate that findings of both jeopardy and adverse modification in Section 7 consultations are infrequent,<sup>168</sup> while findings of adverse modification without a simultaneous finding of jeopardy are all but unheard of.<sup>169</sup> An approach to Section 7 consultation which reflected the ESA’s greater statutory focus on conservation and restoration of critical habitat—as emphasized in cases like *Gifford Pinchot Task Force*<sup>170</sup> and *Sierra Club v. U.S. Fish & Wildlife Service*<sup>171</sup>—might be able to protect listed species more effectively by encouraging restoration and preventing adverse modification on critical habitat which has already been designated.<sup>172</sup> In the longer term, a regulatory approach which aimed to streamline the use of the Section 7 consultation process going forward might ultimately serve the overall conservation purposes of the ESA better than expansive uses of the critical habitat designation process would.

Weighing against the potential advantages of a narrow definition of “habitat” is the fact that even a restrictive definition is unlikely to answer the statutory interpretation question of how

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<sup>167</sup> See Ruhl, *What Is Habitat?*, *supra* note 38, at 54 (“Perhaps a way to reconcile all this is to acknowledge that the ESA was not designed to be the exclusive mechanism for conserving species in peril. If critical habitat must be a subset of habitat, habitat should be defined in a way that does not stretch credulity.”).

<sup>168</sup> Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 Fla. L. Rev. 141, 161–64 (2012) (data analysis of 4,048 Section 7 biological opinions “prepared for threatened or endangered fish species between January 1, 2005 and December 31, 2009.”).

<sup>169</sup> *Id.* at 165–67.

<sup>170</sup> See *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004), *amended*, 387 F.3d 968 (9th Cir. 2004)

<sup>171</sup> See *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 441–42 (5th Cir. 2001)

<sup>172</sup> See generally Jennifer Jeffers, *Reversing the Trend Towards Species Extinction, or Merely Halting It? Incorporating the Recovery Standard into ESA Section 7 Jeopardy Analyses*, 35 Ecology L.Q. 455 (2008) (discussing potential approaches for reevaluating the Section 7 consultation process in terms of the ESA’s conservation and recovery goals).

to define “habitat” in a simple or satisfactory manner. The ESA itself fails to define “habitat” or set statutory parameters for how “habitat” should be understood, and the term “habitat” is not used consistently in either federal statutes or the Services’ own regulations.<sup>173</sup> Likewise, even in a plain-language approach, the proper application of the dictionary definition of “habitat” is not obvious when it comes to difficult cases like Unit 1 in *Weyerhaeuser*, where the conventional understanding of “habitat” is at odds with the altered circumstances of the areas in question:

“habitat” is defined in the Merriam-Webster dictionary as “the place or environment where a plant or animal naturally or normally lives and grows”; in the Oxford dictionary as “the natural home or environment of an animal, plant, or other organism”; and in the National Geographic encyclopedia as “a place where an organism makes its home.” ... None of these definitions helps explain what kind of unoccupiable area can be habitat, beyond a finding that the area is where a species “normally” or “naturally” makes its home. In the dusky gopher frog's case, for example, one could argue that “normally” the frog would use the area as its home, but humans have prevented this by altering the “natural” conditions of the uplands habitat. On the other hand, taking the area as it is today, it would not be “normal” or “natural” for the species to occupy it.<sup>174</sup>

Given the inherent difficulties of assessing “habitat” in this context, it seems that it may not ultimately be practicable to constrain the possible interpretations of “critical habitat” using the ordinary meaning of “habitat”: although, as the Supreme Court concluded in *Weyerhaeuser*, the interpretation of “critical habitat” must be constrained by the meaning of “habitat” in order to be reasonable, the concept of “habitat” itself resists easy definition or categorization in the context of climate change and human-nature interaction.

In this sense, the core statutory interpretation issue with regard to critical habitat designations ultimately seems to call for the application of at least some degree of case-by-case scientific and technical analysis. While courts are understandably concerned about the potential

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<sup>173</sup> See Ruhl, *What Is Habitat?*, *supra* note 38, at 53–54.

<sup>174</sup> *Id.* at 54.

for agencies to overreach when given the ability to interpret the scope of their own statutory authority, the wide-ranging and strongly-worded protection and conservation mandates of the ESA, along with the significant technical complexity of the biological, ecological, and other scientific judgments entailed in determining a given species' habitat, lend weight to the prospect that agencies' interpretations should be given significant deference in the context of critical habitat designations.