No. 17-71

In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE FORMER DEPARTMENT OF THE INTERIOR OFFICIALS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are former leaders of the Department of the Interior ("DOI"), ranging from the Nixon administration through the Obama administration, who administered and enforced the Endangered Species Act ("ESA"), including reviewing, overseeing, and approving critical habitat designations. Amici file this brief to demonstrate that the critical habitat designation made here was consistent with critical habitat designations made throughout the years, and to provide the perspective of the agency officials who are responsible for these determinations.

Each of the amici served in leadership positions at DOI since the passage of the ESA.

Beginning in 1974, Donald Barry spent over eleven years as an attorney in the Solicitor's Office of DOI, including six years as chief counsel for the U.S. Fish and Wildlife Service ("FWS" or "Service"). As an attorney for the Service, Mr. Barry was charged with legal review of nearly all critical habitat designation decisions. He later returned to DOI during the Clinton administration, where he spent seven-and-a-half years in the office of the Assistant Secretary for Fish and Wildlife and Parks, serving for three-and-a-half years

[1] No counsel for a party authored this brief in whole or in part, and no person other than amici made a monetary contribution intended to fund the preparation or submission of this brief. The parties have all filed blanket consents to amicus briefs. Pursuant to Rule 37.3(a) of Rules of this Court, letters of consent from all parties to the filing of the brief are on file or have been submitted to the Clerk of the Court.

as the Assistant Secretary for Fish and Wildlife and Parks. In that position, Mr. Barry reviewed and provided final approval for critical habitat designations after they came from the Director of FWS and the Solicitor's Office. In total, Mr. Barry spent 19 years working at DOI as a career attorney or in a leadership position in the office of the Assistant Secretary.

Michael J. Bean worked at DOI from 2009 to 2016 during the Obama administration. During his tenure at DOI, he served initially as counselor to the Assistant Secretary for Fish and Wildlife and Parks, and ultimately as the Principal Deputy Assistant Secretary. Mr. Bean is the co-author of *The Evolution of National Wildlife Law*, which is generally regarded as the leading text on the subject of wildlife conservation law.

George Frampton served as Assistant Secretary for DOI for four years, from 1993 to 1997, during the Clinton administration. As Assistant Secretary for DOI, Mr. Frampton reviewed and approved all listings and critical habitat designations. In addition to his time at DOI, Mr. Frampton served as the Chairman of the White House Council on Environmental Quality, where he served as President Clinton's principal advisor on environmental issues. In this role, Mr. Frampton regularly dealt with endangered species, including listings and critical habitat designations, as the Secretary for DOI would often consult with the Council on Environmental Quality in difficult or close cases.

Nathaniel Reed became the Assistant Secretary for DOI for Fish and Wildlife and Parks in 1971 during

the Nixon administration and remained in that position through the Ford administration. During his tenure as Assistant Secretary for DOI, Mr. Reed lobbied on behalf of and testified in favor of the passage of the ESA.

SUMMARY OF ARGUMENT

Weyerhaeuser ("Petitioner"), the Markle Interests LLC,[2] and their amici incorrectly portray how and why critical habitat designations are made. This brief gives voice to former leaders at DOI, who made these science-based determinations through a highly regulated and careful process.

First, the brief presents the perspective of the former DOI leaders regarding the role of critical habitat designations in species conservation and the process necessary to reach determinations based on science. These designations play a vital role in species recovery and are necessarily crafted by conservation experts using a methodical process rooted in complex scientific analysis. The designation of critical habitat for a listed species that is degraded and would benefit from restoration can nevertheless be essential for the species' conservation.

[2] The Markle Interests LLC include Markle Interests, LLC, P&F Lumber Company 2000, LLC, and PF Monroe Properties, LLC.

Amici's experience also shows that allowing judicial review for decisions not to exclude would result in increased litigation and additional economic analyses and would be administratively infeasible. The result would thus divert necessary resources from the ESA's main objective of recovery of endangered wildlife.

ARGUMENT

I. To Further the Objectives of the Endangered Species Act, Designation of Critical Habitat Must Be Based on Methodical Scientific Analysis by Species Conservation Experts.

A. The evolution of critical habitat designations in the ESA.

When Congress enacted the ESA in 1973, it introduced two new features that had not been a part of predecessor legislation in 1966 and 1969. *Compare* Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884, 886 (1973), *with* Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926, 926 (1966), *and* Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275, 275 (1969). One was the concept of critical habitat, which recognized that the degradation and loss of habitat was the most significant threat to the survival of endangered and threatened species.

The other was the notion that federal agencies bore a special responsibility to refrain from actions

that would further imperil already highly imperiled species. This special responsibility of federal agencies was embodied in Section 7 of the ESA, which requires that federal agencies insure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species or destroy or adversely modify its critical habitat. Endangered Species Act of 1973, Pub. L. No. 93-205 § 7, 87 Stat. 884, 886 (1973) (codified as amended at 16 U.S.C. §§ 1536 to 1544 (2012)). This special duty of federal agencies is the only operative result of a critical habitat designation. Critical habitat designation does not directly affect what private and other non-federal landowners may do with their property, except insofar as they require a federal permit or received federal funding in connection therewith.

The ESA, as enacted in 1973, neither defined the term critical habitat nor required its designation for each listed species. *See id.* That soon changed, however, as a result of a series of amendments from 1978 to 1982. Those amendments both defined the term to include occupied and unoccupied areas and required that each new listing of a species as endangered or threatened be accompanied at the time of listing by a critical habitat designation, subject only to a very narrow set of exceptions. *See* Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751, 3764 (1978) (codified as amended at §§ 1532 to 1536, 1538 to 1540, 1542 (2012)); Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411 (1982) (codified as amended at 16 U.S.C. §§ 1531 to 1533, 1535

to 1537a, 1538 to 1540, 1542 (2012)). These specific amendments are now codified in the ESA. *See* 16 U.S.C. § 1532(5); 16 U.S.C. § 1533(a)(3); 16 U.S.C. § 1533(c). Thus, critical habitat plays a vital, but limited role in achieving the ESA's purposes.

B. Critical habitat designations are necessary to achieve the objectives of the Endangered Species Act.

Conservation of listed species is the ESA's key objective. *See* 16 U.S.C. § 1531(b). Further, the ESA seeks to secure the recovery of endangered and threatened species, bringing them back from the brink of extinction so that they may be de-listed. *See also* 16 U.S.C. § 1532(3) (defining "conserve," "conserving," and "conservation," to 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"). Assuring adequate habitat for the species to persist is a prerequisite to conserving a species. *See* Ronny Millen & Christopher L. Burdett, *Critical Habitat in the Balance: Science, Economics, and Other Relevant Factors*, 7 Minn. J.L. Sci. & Tech. 227, 268 (2005) ("[H]abitat conservation is the key component of effective species conservation."); Amy Armstrong, *Critical Habitat under the Endangered Species Act: Giving Meaning to the Requirements for Habitat Protection*, 10 S.C. Envtl. L.J. 53, 75 (2002) ("'The relationship between vanishing habitats and vanishing species is well documented. . . .'" (quoting

Nat'l Res. Council, Science and the Endangered Species Act (1995))).

Critical habitat designation is a key conservation tool for assuring adequate suitable habitat for species recovery. *See* 16 U.S.C. §§ 1532(5)(A), 1533(a)(3); Kalyani Robbins, *Recovery of an Endangered Provision: Untangling and Revising Critical Habitat under the Endangered Species Act*, 58 Buff. L. Rev. 1095, 1117 (2010) ("[T]he legislative history supports the importance of critical habitat . . . including compelling statements such as: 'the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitats.'" (quoting H.R. Rep. No. 94-887, at 3 (1976))); Armstrong, *supra*, at 54 ("When Congress enacted this amendment it 'observed that protection of the habitat of listed species was the key to protection of the species themselves' because the loss of habitat is the universally recognized reason for the extinction of species." (quoting S. Rep. No. 106-126, at 4 (1999))).

Members of Congress recognized the importance of habitat protection in saving endangered species from extinction. *See* 119 Cong. Rec. 30,528 (1973) (statement of Rep. Lehman) ("The new law recognizes that the greatest threat to endangered animals has been man's destruction of their habitat."); 119 Cong. Rec. 30,162 (1973) (statement of Rep. Sullivan) ("For the most part, the principal threat to animals stems from the destruction of their habitat.").

C. DOI takes a cautious, methodical, and reasoned approach to designating critical habitat.

Designating critical habitat requires a formal, multi-step process that incorporates scientific and economic analysis, public notice and comment, and, as of recently, outside peer review. *See* 50 C.F.R. § 424.12. Because of the scientific complexity of critical habitat designations and their significance in achieving recovery, DOI is mandated to make these designations based on the "best scientific data available." 16 U.S.C. § 1533(b)(2).

For several decades, the critical habitat designation process has started at the regional level, and then proceeded to a formal review process at the national agency and departmental level. For example, during the Clinton Administration, the formal review process for listing a species involved the review and sign-off by attorneys for FWS in the Solicitor's Office, and then the final review and decision by the Director of FWS. When a new listing also included a critical habitat designation, that decision was also reviewed and approved by the Assistant Secretary for Fish and Wildlife and Parks. This process also incorporates an opportunity for public comment following publication in the Federal Register, and can involve public hearings. Throughout the entire process, there is ample opportunity for input from affected state fish and wildlife agencies and the public, as well as consideration and analysis of expert opinion from scientists, economists, and other specialists. *See* 16 U.S.C. § 1533(b)(5).

Amici who were DOI political appointees relied on the professional judgment and decisions of the Directors of FWS they oversaw, as the Director is required by law to be trained and experienced in wildlife conservation. 16 U.S.C. § 742b(b) ("No individual may be appointed as the Director unless he is, by reason of scientific education and experience, knowledgeable in the principles of fisheries and wildlife management."). ESA decisions involve complex scientific issues, and it is only prudent to rely on professionals with a strong background in wildlife biology and conservation.

D. Critical habitat designations reflect the unique biological realities and conservation needs of each species.

Even before Congress supplied a definition of critical habitat through the 1978 Amendments, FWS relied upon its regulatory definition that made clear that species were not limited to currently occupied areas. Specifically, that regulatory definition included both occupied areas and additional areas needed for "population expansion." *See* Guidelines to Assist Federal Agencies in Complying with Section 7 of the Endangered Species Act, issued by the Director of the U.S. Fish and Wildlife Service on April 22, 1976. That additional areas may be needed for population expansion of a depleted species had never been questioned.

It would follow from the Petitioner's position that federal agencies could authorize, fund, or carry out actions that would permanently destroy the very areas

necessary for recovery of the species. It is unlikely that Congress would have intended federal agencies to act with such disregard for the recovery prospects of endangered species. Yet, that would be the practical result of a ruling that land that has been sufficiently altered that it cannot currently be occupied cannot be designated as critical habitat, even though it offers the best prospects for successful restoration of all formerly occupied sites.

FWS may purposefully designate as critical unoccupied habitat that is distant from occupied habitat. Such designation reduces the risk of both the occupied and unoccupied habitat being subject to the same environmental conditions. For example, FWS designated unoccupied habitat as critical for the Bay checkerspot butterfly, because the unoccupied habitat would not be subject to the same rainfall regime as the occupied habitat. 73 Fed. Reg. 50,406-52 (Aug. 26, 2008) (codified at 50 C.F.R. pt. 17). FWS noted in its designation that, "[v]ariations in amount and timing of rainfall play a significant role in determining when host plants become senescent, which in turn influences larval mortality and ultimately is the key factor in the butterfly's population size." *Id.* at 50,415. FWS included "three unoccupied units in San Mateo County, because we recognized that units in close proximity to one another (i.e., many of the units in Santa Clara County) would likely experience similar environmental conditions." *Id*.

There are several reasons, moreover, why unoccupied land may be essential for conservation of a listed

species. For example, in 1980, DOI listed the Coachella Valley Fringe-toed Lizard as Threatened. Endangered and Threatened Wildlife and Plants: Listing as Threatened with Critical Habitat for the Coachella Valley Fringe-Toed Lizard, 45 Fed. Reg. 63,812-20 (Sep. 25, 1980) (codified at 50 C.F.R. pt. 17). The critical habitat designation for the lizard included sandstone cliffs, even though the lizard does not inhabit the cliffs. Erosion of the cliffs supplies sand for the sand dunes where the lizard lives. The lizard does not live on the cliffs, nor could it subsist solely on those cliffs, but the cliffs are necessary to supply sand essential for the lizard's survival and recovery; consequently, they were appropriately designated as critical habitat.

Natural disasters such as wildfires and hurricanes, climate change, and rapid development all could—independently or in combination—make currently occupied habitat inadequate for the recovery of threatened or endangered species. In such cases, it could be crucial that there be unoccupied land designated as critical habitat should currently occupied areas become subsequently inhospitable habitat, and thus allow for the species' survival and recovery.

Some species, like the dusky gopher frog, have been so reduced in range that they cannot recover unless their current range is expanded. *See* J.A. 124 ("The scientific peer reviewers that responded to our original proposed critical habitat rule were united in their assessment that this proposal was inadequate for the conservation of the dusky gopher frog and that we should look within the species' historic range outside

the state of Mississippi for additional habitat for the designation."); J.A. 160 ("In fact, no group of five ponds such as these was found in any of the areas of historical occurrence that we have searched in Mississippi."). The Petitioner's position would have the practical effect of limiting critical habitat to an area insufficient to recover the species.

E. To be designated unoccupied critical habitat, the habitat does not have to be pristine: it can be less than optimal or even degraded habitat.

Petitioner contends that the statute and regulations do not permit designation of critical habitat currently unoccupied by the listed species unless that habitat is fully capable at present of supporting the species and thus members of the species could be successfully relocated on it tomorrow. That is not required by the statutory definition of critical habitat. Nor is it compatible with the purpose of the ESA or its amendments. In this case, the record is clear that Unit 1 *could* likely support an initial breeding population of the dusky gopher frog, but without some additional modification around the ponds the habitat would not be optimal and the frog population might struggle to flourish or grow there.

That unoccupied areas must be presently capable of supporting the species—or that current owners must be willing to make modifications to accommodate species survival—are not statutory conditions or

requirements for designating such areas as critical habitat. While designation of degraded or non-pristine habitat outside the currently inhabited range of a listed species will likely be rare and must be carefully assessed by the reviewers involved, the definition of critical habitat specifically contemplates unoccupied areas as critical habitat, without any limitation that such areas be presently capable of supporting the species. *See* 16 U.S.C. § 1532(5)(A)(ii) ("The term 'critical habitat' for a threatened or endangered species means . . . specific areas *outside the geographical area occupied by the species* at the time it is listed. . . ." (emphasis added)). Indeed, the critical habitat designation made here for unoccupied areas was carefully assessed and FWS limited its critical habitat designation. *See* J.A. 159 (noting that FWS identified over sixty ponds in Alabama and declined to designate such areas as critical habitat).

F. Critical habitat designations are not unduly burdensome to private landowners.

Petitioner depicts a parade of burdens that it will face because Unit 1 has been designated critical habitat. Petitioner's position, however, overlooks the fact that a critical habitat designation often imposes little or no burden on private landowners.

Petitioner focuses primarily on the perceived restrictions that could be placed on its use of the land if a proposed action triggered a Section 7 consultation. What Petitioner does not acknowledge is that Section

7 consultation is triggered only if there is a basis for federal involvement in their proposed action, such as funding or issuing a federal permit. Absent that federal nexus, no Section 7 consultation would be necessary should Petitioner continue to use Unit 1 for timber production.

Indeed, it is the amici's experience that Section 7 consultations almost never result in the landowners being barred from moving forward with development of their land. A recent study examined Section 7 consultations between January 2008 and April 2015, and found that *none* of the 88,290 Section 7 consultations during that timeframe resulted in proposed actions being "stopped or extensively altered as a result of FWS finding jeopardy or destruction/adverse modification." Jacob W. Malcom & Ya-Wei Li, *Data Contradict Common Perceptions About a Controversial Provision of the U.S. Endangered Species Act,* 112 PNAS 15844 (2015), http://www.pnas.org/content/112/52/15844; *see also* Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 Fla. L. Rev. 141, 164 (2012) ("Like the prior studies, I found that jeopardy and adverse modification determinations are rare. Within the set of biological opinions that I reviewed, FWS found jeopardy 7.2% of the time and adverse modification for 6.7% of eligible opinions."); Amy Sinden, *The Economics of Endangered Species: Why Less is More in the Economic Analysis of Critical Habitat Designations*, 28 Harv. Envtl. L. Rev. 129, 141 (2004) ("Even in the relatively small number of consultations that result in a finding of jeopardy or adverse modification, the

wildlife agency usually suggests minor project modifications—'reasonable and prudent alternatives'—that allow the project to proceed without violating the Act.").

Petitioner inaccurately contends that a critical habitat designation will cost it $34 million in potential revenue. Petitioner ignores that the Service's economic analysis concluded that the impact of a critical habitat designation would be a range from $0 to $34 million. It is standard practice when making critical habitat designations to provide a range of possible economic costs, given the uncertainties involved in such a projection. These ranges are inherently uncertain and are often subject to much disagreement among economists. *See id.* at 146 ("These attempts to quantify the costs of critical habitat designation in dollar terms clearly involve innumerable layers of simplifying assumptions, each of which is highly vulnerable to attack. While FWS sometimes makes an effort to acknowledge these inherent uncertainties by expressing cost estimates as a range, it is likely that any economist paid to do the job could demonstrate that a different set of reasonable assumptions could lead to a final estimate lower than FWS's low figure or higher than its high figure." (citations omitted)).

In the case where a Section 7 consultation is necessitated for a project on private land, because of a federal nexus, FWS works with the relevant federal agency and the landowner to develop economically reasonable alternatives that would allow the proposed use or project to move forward without further

compromising the listed species. Given the low probability of a Section 7 consultation being triggered at all in the instant case, along with the wide range of projected potential costs, the Service's desire to minimize effects on landowners, and its record of rarely reaching a jeopardy or adverse modification conclusion, Petitioner's concern about the cost of Unit 1's critical habitat designation is unwarranted.

Moreover, DOI regularly works with private landowners to offer a range of options to avoid a determination that would impede the landowner's plans to develop or use the land. For example, DOI offers safe harbor agreements or agrees to enter into Habitat Conservation Plans ("HCPs"). Safe harbor agreements are voluntary agreements between private landowners and the federal government in which the private landowners agree to take actions to aid in the recovery of endangered or threatened species. In exchange for entering into one of these agreements, the federal government agrees that it will not require any additional actions to be taken on the land without the private landowners' consent. *See For Landowners: Safe Harbor Agreements*, https://www.fws.gov/endangered/landowners/safe-harbor-agreements.html (last visited June 15, 2018). Another tool that DOI may use to work with landowners are HCPs. HCPs are plans jointly developed between the private landowner and FWS that allow for economic development of the land that would simultaneously promote conservation for endangered or threatened species. *See Working Together: Tools for*

Helping Imperiled Wildlife on Private Lands, https://www.fws.gov/endangered/esa-library/pdf/ImperiledWildlifeFinalDec2005.pdf (last visited June 15, 2018). FWS regularly enters into both of these types of agreements with private landowners, and they have been successful at furthering the objectives of the ESA. *See, e.g.*, *id.* ("More than 300 landowners have enrolled over 3.6 million acres in 32 Safe Harbor Agreements that protect 36 species listed as endangered or threatened-species such as the northern aplomado falcon, San Joaquin kit fox, and red-cockaded woodpecker."); *id.* ("Since 1987, USFWS has entered into over 35,000 landowner agreements."). In fact, FWS has excluded areas from critical habitat designation where such areas were subject to an HCP or safe harbor agreement. *See, e.g.*, 78 Fed. Reg. 22,626, 22,638 (April 16, 2013) (exercising discretion to exclude units proposed as critical habitat for two plant species that fell within two habitat conservation plans).

II. Judicial Review of FWS's Decisions To Not Exclude Certain Lands from Critical Habitat Designations Would Be Unworkable.

The ESA specifically provides that the decision not to exclude certain lands from critical habitat designations is discretionary. 16 U.S.C. § 1533(b)(2) ("The Secretary *may exclude* any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such areas as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the

failure to designate such area as critical habitat will result in the extinction of the species concerned." (emphasis added)).

Allowing for judicial review of these decisions is likely to be administratively unworkable and judicially unwieldy. Many critical habitat designations encompass hundreds of thousands of acres and include large numbers of individual parcels, each with a different owner. In such circumstances, there is an almost limitless number of exclusion possibilities, particularly since the exclusion of any one area may make essential the designation of other areas. This is why Congress gave FWS broad discretion to exclude areas but refrained from compelling it to do so whenever a particular standard was met.

The statute gives no guidance to courts reviewing a decision not to exclude certain unoccupied habitat. It lists certain criteria that "may" be considered to exclude a unit of habitat, such as economic cost, but it does not help courts determine when the FWS has abused its discretion *not to exclude* a unit from a designation.

In order to carry out the conservation purpose of the ESA, amici have historically—and correctly—relied on the judgment of the FWS Director, which is heavily rooted in scientific analysis and professional training. This applies particularly to highly complex determinations regarding designation of critical

habitat. Accordingly, courts should similarly defer to the discretionary authority granted to FWS.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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