



## Enviros Urge 5th Circ. To Uphold La. Frog Habitat Decision

By Juan Carlos Rodriguez

Law360, New York (January 05, 2015, 2:20 PM ET) -- Environmentalists on Monday urged the Fifth Circuit to reject timber giant Weyerhaeuser Co.'s appeal of the U.S. Fish and Wildlife Service's decision to declare 1,600 acres of private property in Louisiana as a refuge for the endangered dusky gopher frog.

The groups said the land, owned by Weyerhaeuser and others, was properly designated as critical habitat under the Endangered Species Act. In a brief, the environmentalists said the parcel, dubbed Unit 1, is essential for frog conservation because it contains the best habitat remaining in Louisiana, important breeding sites for recovery, and habitat for population expansion outside of the core population areas in Mississippi.

Weyerhaeuser and its allies said a district court was wrong to uphold the designation, arguing that the agency had overstepped its authority by designating their land in St. Tammany Parish, Louisiana, as a critical habitat that could be used to revive the species.

Unlike areas in neighboring Mississippi that have been set aside as habitats, the Louisiana parcel doesn't have the necessary features for the frog to survive, and a live specimen hasn't been spotted in the area since the 1960s, the landowners said.

"The landowners argue that Unit 1 cannot be lawfully designated because the landowners refuse to cooperate in frog recovery. But the landowners' unwillingness to conserve the frog provides no basis for setting aside the critical habitat designation," the environmentalists' brief said.

It said nothing in the ESA requires that unoccupied critical habitat be utilized for frog conservation "now" or in the "foreseeable future," as the landowners have argued. The green groups said that would be an unreasonable interpretation of the ESA that invents requirements not found in the statute's plain language.

And the groups said the landowners cannot point to a single document that contradicts the experts' finding that the Louisiana parcel is essential habitat for the frog.

"The landowners' complaints about FWS' economic analysis also miss the mark. At bottom, the landowners believe that their economic interests in Unit 1 outweigh the benefits for the frog," the environmentalists' brief said.

The groups said even if that were true, the FWS did the requisite economic analysis, and nothing in the ESA requires the FWS to exclude lands from the critical habitat designation for economic considerations. They said every court that has examined the issue has found that the FWS' decision not to exclude land is committed to agency discretion and unreviewable.

Finally, the environmental groups said the landowners' additional arguments that the FWS should have done an environmental review under the National Environmental Policy Act must also be rejected. They said the U.S. Supreme Court and the Fifth Circuit have held that NEPA does not apply to actions that do not cause a change to the physical environment.

"As the district court found, the record here makes clear that no change to the physical environment will occur as a direct result of the critical habitat designation," the groups said.

The environmental groups are represented by Collette Adkins Giese and John Buse of the Center for Biological Diversity.

The landowners are represented by Richard C. Stanley of Stanley Reuter Ross Thornton & Alford LLC and M. Reed Hopper of Pacific Legal Foundation.

The FWS is represented by Luther L. Hajek, Mary Hollingsworth and David C. Shilton of the U.S. Department of Justice.

The case is Markle Interests LLC et al. v. U.S. Fish and Wildlife Service et al., case number 14-31008, in the U.S. Court of Appeals for the Fifth Circuit.

--Additional reporting by Lance Daroni. Editing by Katherine Rautenberg.