High Court's Frog Opinion Reaches Beyond ESA

By **Keith Bradley**
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The U.S. Supreme Court's recent decision in Weyerhaeuser Co. v. U.S. Fish and Wildlife Service made headlines because of the sad outcome for the dusky gopher frog, an endangered species for which the FWS had identified critical habitat. The court interpreted the Endangered Species Act to allow critical habitat designations only in areas that the FWS determines are truly habitat for a given species. The ESA is unquestionably a statute with broad scope, and the Weyerhaeuser opinion is important guidance for the FWS' decisions under the statute. However, a second aspect of the opinion will likely have even larger consequences because it reclaims judicial authority over agency decision-making that had been eroding. Weyerhaeuser provided crucial instructions to federal courts about the availability of judicial review under the Administrative Procedure Act.

The APA generally allows review of final agency actions, but it has important limitations. Among those, it excludes actions for which "statutes preclude judicial review" and those decisions that are "committed to agency discretion by law[1]." To the extent a decision is "committed to agency discretion" in this sense, the decision is insulated from judicial review, no matter how irrational the decision may appear or how seriously it may affect a plaintiff. Whether that exclusion is broad or narrow is critical for a great many cases challenging agency decision-making.

The "committed to agency discretion" concept is, on its face, difficult to square with another phrase in the APA, which says a court shall "set aside" agency action that is an "abuse of discretion."[2] How can a court assess whether an action was an abuse of discretion if it is not supposed to review discretionary decisions in the first place? The Supreme Court has taken two approaches to reconciling these provisions. First, over the years, it has identified several types of decisions that it says are traditionally viewed as "committed to agency discretion," such as a decision not to initiate enforcement action,[3] a refusal to grant reconsideration of a prior decision,[4] and an allocation of funds from a lump-sum appropriation[5]. Second, the court has said a decision is "committed to agency discretion," and not susceptible to review, when the statutory language "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."[6]

The "no meaningful standard" language has become a source of mischief. Although the Supreme Court said it should apply only in "rare circumstances,"[7] courts have found decisions "committed to agency discretion" under this doctrine with increasing frequency. A few examples from an unscientific sample of agency actions that have been protected in recent years: the Federal Motor Carrier Safety Administration's decision to authorize Mexican truck companies to provide U.S. cargo service, which petitioners claimed was based on insufficient evidence of safety;[8] the U.S. Trade Representative's distribution of compensatory trade benefits;[9] and the U.S. Department of Agriculture's regulations implementing a grant program for waterway conservation.[10] Some courts have begun to

focus on the statutory language that confers agency discretion, and overlook how statutes guide that discretion. For example, the U.S. Court of Appeals for the Ninth Circuit held that a particular decision was insulated from review because the statute directs the agency to use such rules "as may be acceptable." The opinion does not inquire whether the statute provides[11] any purposes and standards for the agency to follow. This shift has made "committed to agency discretion" a serious potential obstacle to judicial review in many cases.

The Weyerhaeuser case brought these developments to a head. The case involved the FWS' designation of critical habitat for the dusky gopher frog. To thrive in an area, the frog requires certain features in the terrain and vegetation. Among the critical habitat areas, the FWS designated certain properties that had appropriate terrain, but where the forest had long ago been changed in ways that make it not suitable for dusky gopher frogs. Landowners challenged the designation on two grounds: first, that it was beyond the scope of legitimate "critical habitat"; and second, that the FWS had not made rational use of its authority to exclude critical habitat where a designation would be too costly. With respect to the second point, the ESA says the FWS "may" exclude an area if the benefits of exclusion would outweigh the benefits of designating it as critical.[12] The landowners argued the FWS' weighing of benefits was arbitrary and capricious. However, the U.S. Court of Appeals for the Fifth Circuit, focusing on the phrase "may exclude," held that a decision not to exclude is "committed to agency discretion by law."

The Supreme Court's opinion is a healthy corrective. In general, the court reiterated that, aside from the categories mentioned above, it is rare and unusual for an agency decision to be "committed to agency discretion by law."[13] That reminder should, on its own, encourage courts to be more sparing in their use of the "committed to agency discretion" principle. More pointedly, the court refocused the "meaningful standards" inquiry. The ESA does not say that the FWS shall exclude or designate an area depending on whether a certain standard is met; it says the FWS "may" exclude. The court held that simply using the word "may" does not insulate a decision from judicial review. The ESA clearly indicates that the FWS should consider economic impact when it makes its decision. That is enough of a "meaningful standard," because courts[14] can review whether the agency has "appropriately consider[ed] all the relevant factors."

The Weyerhaeuser opinion casts doubt on many of the "committed to agency discretion" cases of recent years, including the examples mentioned above. In the future, agencies should have much less room to argue that their decisions are protected from judicial review. It will be interesting to see whether an awareness of that change percolates into agency policy teams and affects how decisions are actually made. For now, it is good to know that the courthouse doors are open a bit wider.

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[1] 5 USC 701(a).

[2] 5 U.S.C. 706(2)(A).

[3] Heckler v. Chaney, 470 U.S. 821 (1985).

[4] ICC v. Locomotive Eng'rs, 482 U.S. 270 (1987).

[5] Lincoln v. Vigil, 508 U.S. 182 (1993).

[6] Heckler, 470 U.S. at 830.

[7] Lincoln, 508 U.S. at 191.

[8] Int'l Bhd. of Teamsters v. U.S. Dep't of Transportation, 861 F.3d 944 (CA9 2017).

[9] Almond Bros. Lumber Co. v. United States, 721 F.3d 1320 (CAFC 2013).

[10] Stew Farm, Ltd. v. Natural Res. Conservation Serv., 767 F.3d 554 (CA6 2014).

[11] Flathead Irrigation Dist. v. Zinke, 725 F. App'x 507 (CA9 2018).

[12] 16 USC 1533(b)(2).

[13] Slip op. at 12.

[14] Slip op. at 14.