UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS

MARKLE INTERESTS, LLC, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICE, et al., Defendants.	CIVIL ACTION CASE NO. 13-234 PERTAINS TO 13-234 SECTION: F JUDGE: MARTIN L.C. FELDMAN MAG. JUDGE: SALLY SHUSHAN

FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to L.R. 7 and this Court's February 13, 2014 Scheduling Order, Federal Defendants hereby cross-move for summary judgment on all counts raised by Plaintiff Markle Interests in its Complaint filed on February 7, 2013, ECF No. 1. This motion is based on the accompanying Memorandum of Points and Authorities and Statement of Material Facts, as well as the Administrative Record lodged with the Court on August 19, 2013. [1]

Markle challenges U.S. Fish and Wildlife Service's ("FWS") final rule designating critical habitat for the dusky gopher frog in St. Tammany Parish, Louisiana, pursuant to the Endangered Species Act. 77 Fed. Reg. 35118 (June 12, 2012) ("Rule"). With only about 100 adult frogs left in the wild, the dusky gopher frog is at high risk of extinction. 75 Fed. Reg. 31387, 31394 (June 3,

[1] Federal Defendants include two photographs as examples of the ephemeral ponds in Unit 1, both of which are also found in the Administrative Record. *See* Exhibit 1.

2010). The land at issue here, in its totality, contains the best frog breeding habitat in the species' historical range. The Rule and Administrative Record show that FWS carefully considered all relevant factors and ultimately arrived at a reasoned decision that this area within St. Tammany Parish is essential to the conservation of this critically endangered species. Moreover, Plaintiff has failed to demonstrate standing. For the reasons stated in the accompanying Memorandum, this Court should dismiss Plaintiff's Complaint or, in the alternative, grant summary judgment in favor of the Defendants.

DATED this 21st day of February, 2014.

Respectfully Submitted,

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UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS

MARKLE INTERESTS, LLC, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICE, et al., Defendants.	CIVIL ACTION CASE NO. 13-234 PERTAINS TO 13-234 SECTION: F(1) JUDGE: MARTIN L.C. FELDMAN MAG. JUDGE: SALLY SHUSHAN **CERTIFICATE OF SERVICE**

I hereby certify that today I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to all counsel of record.

/s/ Mary Hollingsworth
MARY HOLLINGSWORTH

UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS

MARKLE INTERESTS, LLC, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICE, et al., Defendants.	CIVIL ACTION CASE NO. 13-234 PERTAINS TO ALL CASES SECTION: F JUDGE: MARTIN L.C. FELDMAN MAG. JUDGE: SALLY SHUSHAN

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR OPPOSITION TO PLAINTIFF MARKLE'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants, through undersigned counsel, respectfully submit the following memorandum in support of their Opposition to Plaintiff Markle's Motion for Summary Judgment and Cross-Motion for Summary Judgment.

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INTRODUCTION

Plaintiff Markle Interests ("Markle" or "Plaintiff") challenges U.S. Fish and Wildlife Service's ("FWS") designation of 1,544 acres[1] in St. Tammany Parish, Louisiana ("Unit 1"), as critical habitat to conserve the highly endangered dusky gopher frog ("frog") under the Endangered Species Act ("ESA"). 77 Fed. Reg. 35118 (June 12, 2012) (hereafter, "Rule"). With about 100 adult frogs left in the wild, the need for protection and conservation of the species cannot be overstated. Markle raises various challenges to the Rule, all of which fail as a matter of fact and law. Underlying Markle's arguments is its belief that private property should never be designated without the landowner's approval; however, that is not the law. Under the ESA, Congress requires FWS to designate critical habitat and has expressly provided FWS with the discretion to designate "unoccupied" areas, including private property, when necessary. The Rule and administrative record show that FWS carefully considered all relevant factors and ultimately arrived at a reasoned decision that Unit 1, which in its totality contains the best frog breeding habitat in the species' range, must be designated critical habitat as essential to the conservation of this highly endangered species. Moreover, Plaintiff has failed to demonstrate standing. Accordingly, this Court should dismiss Plaintiff's Complaint or, in the alternative, grant summary judgment in favor of the Defendants.

BACKGROUND

I. The Endangered Species Act

The ESA was enacted "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation" of such species. 16 U.S.C. § 1531(b); s*ee Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001) (The purpose of the ESA "is to enable listed species not merely to survive, but to recover from their endangered or threatened status."). The statute defines "conservation" as the

[1] Markle, together with the P&F Lumber Plaintiffs and Plaintiff Weyerhaeuser, collectively "Landowner Plaintiffs," own approximately 45,000 acres in St. Tammany Parish.

"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." 16 U.S.C. § 1532(3). A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6).

One key method for conserving listed species is the designation of critical habitat, which is generally required. *See id.* § 1533(a)(3)(A). FWS may designate as critical habitat both occupied and unoccupied areas. *Id.* § 1532(5)(A). Areas outside the geographical area occupied by the species at the time it is listed may be designated "upon a determination by the Secretary that such areas are essential for the conservation of the species," *id.* § 1532(5)(A)(ii), and only "when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). The designation must be "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." 16 U.S.C. § 1533(b)(2). After considering the various impacts of designation, FWS "may" at its discretion exclude an area from the designation, unless the agency determines that the failure to designate such area as critical habitat will result in the extinction of the species concerned. *Id.*

Critical habitat receives protection under ESA Section 7, which requires federal agencies to consult with the expert agency, here FWS, on any actions "authorized, funded, or carried out by" the agency to ensure that their actions are not likely to destroy or adversely modify critical habitat. *Id.* § 1536(a)(2).[2] If FWS finds that an agency action, such as the issuance of a permit, is likely to adversely modify critical habitat, FWS must suggest reasonable and prudent alternatives that would avoid adverse modification. 50 C.F.R. § 402.14(h)(3). "Reasonable and prudent alternatives" must be "economically and technologically feasible."*Id.* § 402.02.

[2] As Markle appears to concede, ECF No. 69-1, ("Br.") at 3, private property designated as unoccupied critical habitat is not per se regulated by the ESA. Markle's citations to provisions that are applicable only when the listed species is present have no bearing on this case because, as all parties agree, there are no frogs in Unit 1. *See, e.g.,* Br. at 3-4 (citing 16 U.S.C. § 1536(a)(3), which applies only when the listed species "may be present in the area affected" and discussing requirements that apply when an action will cause the "take" of a listed species).

If a private party's action has no federal nexus, i.e., it is not authorized, funded, or carried out by a federal agency, it is not affected by a critical habitat designation.[3] *See Fisher v. Salazar*, 656 F. Supp. 2d 1357, 1359 (N.D. Fla. 2009); *see also* 77 Fed. Reg. at 35121 (explaining that timber management activities on non-federal lands have no federal nexus and, thus, would not be affected). Critical habitat designation does not impose any legally binding duties on private parties, affect land ownership, or establish a refuge, wilderness, reserve, preserve, or other conservation area. *Id*. at 35122; 35128. Nor does designation require implementation of restoration, recovery, or enhancement measures by non-federal landowners. *Id*. at 35128.

II. National Environmental Policy Act ("NEPA")

NEPA serves the dual purpose of informing agency decision-makers of the significant environmental effects of proposed major federal actions and ensuring that relevant information is made available to the public. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). To meet these dual purposes, NEPA requires that an agency prepare a comprehensive environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). For over three decades, FWS has maintained the consistent position that a NEPA analysis is not required for critical habitat designations. *See* 48 Fed. Reg. 49244-02 (Oct. 25, 1983).

III. Dusky Gopher Frog Critical Habitat Rule

The dusky gopher frog is at "high risk of extinction." 75 Fed. Reg. 31387, 31394. There are about 100 adult frogs left in the wild and only one viable breeding population, which is located in Mississippi. Defendants' Statement of Facts ("DSoF") ¶20. In 2001, FWS listed the frog as endangered due to its low population size, ongoing threats such as habitat destruction and degradation resulting from development, and vulnerability to environmental stressors such as drought. DSoF ¶14. Fragmentation and destruction of the frog's habitat has caused the species'

[3] Habitat modification or degradation does not expose property owners to citizen suit liability where the species is not present. Markle cites 50 C.F.R. § 17.3, but omits the key limiting language, which defines harm, in part, as "significant habitat modification or degradation where it actually kills or injures wildlife." (emphasis added). Br. at 7.

small, isolated populations to become genetically isolated and has reduced the space available for reproduction, development of young, and population maintenance. 77 Fed. Reg. at 35130.

At the time of listing, FWS determined that the designation of critical habitat was prudent but, due to budgetary and workload constraints, the agency deferred designation. DSoF ¶22. In June 2010, FWS published a proposed rule to designate critical habitat. DSoF ¶¶25-26. The rule proposed to designate the 96 acres occupied at the time of listing and 1861 acres[4] unoccupied at the time of listing. DSoF ¶27. Based on the best available scientific data on the frog's biological needs, FWS determined that the frog's optimal habitat includes small, isolated, ephemeral ponds for breeding (Primary Constituent Element ("PCE" 1)); upland pine forested habitat that has an open canopy (PCE 2); and upland connectivity habitat (PCE 3).[5] This habitat contains the "physical and biological features necessary to accommodate breeding, growth, and other normal behaviors of the [frog] and to promote genetic flow within the species." 76 Fed. Reg. 59774, 59778. FWS first considered the area occupied by the species at the time of listing, but determined that a designation of unoccupied areas was necessary because "[t]he range of the [frog] has been severely curtailed, occupied habitats are limited and isolated, and population sizes are extremely small and at risk of extirpation and extinction from stochastic events that occur as periodic natural events or existing or potential human-induced events." 77 Fed. Reg. at 35132; 35133.

The proposed rule underwent an independent peer review by six individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. DSoF ¶41. Every peer reviewer concluded that the amount of habitat proposed was insufficient for the conservation of the species, with several suggesting that FWS consider other locations within the frog's historical range. *Id.* ¶44. One peer

[4] Of the 1861 acres proposed, 289 acres were considered currently occupied at the time of the June 2010 proposal. 75 Fed. Reg. at 31395.

[5] FWS considered the physical and biological features essential to the frog's conservation, which include, *inter alia*, space for individual and population growth; nutritional and physiological requirements; breeding sites; and habitat representative of the historical or geographical distribution of a species. 75 Fed. Reg. at 31391. FWS derives the PCEs from consideration of these biological needs. The elements of each PCE are described in detail in DSoF ¶79.

reviewer suggested the area in Unit 1, well-known to those studying the frog as containing at least two historical breeding sites for the frog. *Id.* ¶54-55. Based on all comments received, FWS reanalyzed the "current and historic data for the species, including data from Alabama and Louisiana," to determine if additional habitat qualified as critical habitat. 77 Fed. Reg. at 35124. FWS identified additional critical habitat in Mississippi and Louisiana and included those areas within the revised proposed rule published for comment on September 27, 2011. 76 Fed. Reg. 59774. FWS was unable to identify critical habitat in Alabama. DSoF ¶¶52-53; R1588.

Before FWS finalized the Rule it considered the potential economic impacts of the designation in a draft and then final economic analysis ("DEA" and "FEA"). 77 Fed. Reg. at 35140. The FEA quantified impacts that may occur in the 20 years following the designation. *Id.* It analyzed the economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 avoids impacts to jurisdictional wetlands and, thus, does not trigger ESA Section 7 consultation requirements[6]; (2) development occurring in Unit 1 requires a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which triggers ESA Section 7 consultation between the Corps and FWS, and FWS works with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation; and (3) development occurring requires a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit. DSoF ¶76. Information on the value of Unit 1 land was provided by Landowner Plaintiffs. R6666 (FEA 4-6).

The June 2012 final Rule was the culmination of a series of proposed rules, economic analyses, three rounds of notice and comment, and a public hearing. DSoF ¶¶26, 72-73. The Rule designated 6,477 acres in Mississippi and Louisiana, including the 1,544 acres in Unit 1 which FWS considers to be, in its totality, the highest quality breeding habitat anywhere in the frog's range. 77 Fed. Reg. at 35124; *see also* R1588; 3615. The ephemeral wetlands in Unit 1 contain the physical or

[6] Similarly, if Unit 1 continues to be used for timber harvesting as Mr. Poitevent has stated it would be, there would be no federal nexus and thus no economic impacts. R2216; 2220; *see also* R2065; 6662 (FEA4-2 & n.68); 6663 (FEA 4-3 & n.78). This scenario is also supported by the fact that Weyerhaeuser holds a lease to continue such operations until 2043.

biological features that make up PCE 1. DSoF ¶¶ 54, 56, 59, 60, 61, 62, 63.

IV. Standard of Review—Administrative Procedure Act ("APA")

The challenged Rule is reviewed under the arbitrary and capricious standard set forth in the APA, 5 U.S.C. § 706; s*ee Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 933 (5th Cir. 1998). This standard is "highly deferential" and the agency's decision is afforded a strong presumption of validity. *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 379 (5th Cir. 2008); *see also Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 105, (1983). The court may not "reweigh the evidence or substitute its judgment for that of the administrative fact finder." *Cook v. Heckler*, 750 F.2d 391, 392 (5th Cir. 1985); *see also Texas Oil & Gas*, 161 F.3d at 933-34. Courts must be particularly deferential to agency determinations made within the scope of the agency's expertise. *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000); *see Gulf Restoration Network v. U.S. Dep't of Transp.*, 452 F.3d 362, 368 (5th Cir. 2006).

ARGUMENT

Unit 1 is essential to the conservation of the highly endangered frog. FWS used the best available scientific data, carefully considered every factor and made all determinations required by the ESA to designate Unit 1 as critical habitat for the frog. Plaintiff's arguments, which do not challenge FWS' scientific analysis, lack merit. FWS' Rule clearly passes muster under the applicable, deferential standard of review. Accordingly, Defendants are entitled to summary judgment in their favor as a matter of law.

I. Plaintiff Lacks Article III Standing to Pursue Any of its ESA Claims

Before considering the merits of Markle's claims, the Court must first determine whether Markle has properly invoked the Court's jurisdiction. *Raines v. Byrd*, 521 U.S. 811, 820 (1997). Plaintiff has failed to meet its burden to prove Article III standing by showing that it (1) has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). At the

summary judgment stage, plaintiff cannot rest on "mere allegations," but must set forth by affidavit or other evidence specific facts to establish each element of standing. *Id.* at 561.

Markle has failed to establish an actual or imminent injury. Markle relies on *American Petroleum Institute* to assert a presumption of standing; however, the district court in that case held that a regulated party may establish standing when its declaration establishes that regulatory influences "give rise to cognizable economic injuries or even a 'sufficient likelihood' of such injuries." 541 F. Supp. 2d 165, 177 (D.D.C. 2008). Markle claims that it "may be required" to request federal approval for activities that may affect the species, including adverse habitat modification and that the economic impacts of the Rule "could be as high as $33.9 million," which refers to the third scenario analyzed in the FEA. [7] ECF No. 69-3 at 1-2. Markle does not set forth any evidence that there are concrete and imminent plans to use the land in a way that would trigger ESA Section 7 consultation requirements and thus any need for "federal approval" or any possibility of an economic impact.

"Federal courts consistently deny standing when claimed anticipated injury has not been shown to be more than uncertain potentiality." *Prestage Farms v. Bd. of Supervisors of Noxubee Cnty., Miss.*, 205 F.3d 265, 268 (5th Cir. 2000). When an injury depends on the "occurrence of a number of uncertain events," the future injury is "too conjectural and hypothetical to provide Article III standing." *Id.* Unit 1 is currently being used for timber harvesting, a use that neither implicates a federal nexus nor triggers ESA Section 7 consultation. 77 Fed. Reg. at 35122. The use takes place under a lease agreement that does not expire until June 30, 2043. ECF No. 67-2. Markle does not dispute that timber operations have no federal nexus and are not affected by the designation of Unit 1 as critical habitat. Markle provides no evidence of other concrete development plans that would have a federal nexus sufficient to trigger ESA Section 7 consultation requirements. Moreover, as Markle emphasizes, even after issuing the designation, the "government cannot compel the landowners, including Markle, to manage Unit 1 for the conservation of the gopher

[7] As discussed above in footnote 3, Plaintiff does not face any risk of violating ESA Section 9 as a result of any "habitat modification," or risk liability under the ESA's citizen suit provision.

frog." ECF No. 69-2 at 2; Br. at 5. Markle has not shown that the designation will imminently cause an injury and, thus, Markle has not met its burden of establishing standing to challenge the designation.

II. Markle Lacks Prudential Standing to Bring a NEPA Claim

In order to demonstrate prudential standing, a party must show that the injury complained of "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for [the] complaint." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *see also Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 675 (5th Cir. 1992). Economic harms are not within the zone of interests protected by NEPA. *See Nevada Land Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions."); *Hurd v. Urban Dev., L.C. v. FHA*, 33 F. Supp. 2d 570, 573-74 (S.D. Tex. 1998).

Here, Plaintiff asserts solely economic injuries. *See* Br. at 7 (claiming that the designation will cause $33.9 million in economic impacts); ECF No. 69-3. Plaintiff also claims that it has suffered an environmental injury because the designation of Unit 1 as critical habitat "requires a physical change to the environment," including pond management and controlled burns. Br. at 7-8. Plaintiff submits no affidavits supporting these claimed changes to the environment that allegedly affect its interests, and therefore this argument fails as a matter of law. *Lujan*, 497 U.S. at 884-85 (prudential standing must be supported by sufficient affidavits at the summary judgment stage). Moreover, FWS has no authority to implement any management measures to maintain or improve the habitat on the private land in Unit 1 without the approval of the landowners, a fact highlighted by Plaintiff. *See* ECF No. 69-2 ¶9; *see also* 77 Fed. Reg. at 35128. Plaintiff has made clear that it would never authorize such management of the land. *See* ECF No. 69-3 ¶ 7. Accordingly, Plaintiff's claims of environmental harm are without basis and, therefore, it lacks prudential standing. *See Bldg. Indus. Ass'n v. U.S. Dep't of Commerce*, No. 11-4118, 2012 WL 6002511, at *7 (N.D. Cal. Nov. 30, 2012) (holding that property owners lacked prudential standing under NEPA to challenge a critical habitat designation).

III. Unit 1 Meets the Statutory Definition of "Critical Habitat": FWS Made a Reasonable Determination that Unit 1 is Essential for the Conservation of the Frog

After considering the best available science and the importance of ephemeral ponds to the recovery of the frog, FWS reasonably determined that Unit 1 is essential for the conservation of the species. Unable to show that FWS' finding is arbitrary and capricious, Markle bases its arguments on inapplicable standards and requirements that simply do not exist.

An unoccupied area may be designated if FWS determines that it is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). As Markle concedes, Br. at 10, Congress did not define "essential" or set forth any specific requirements in the ESA for determining what areas are "essential," but rather delegated to the Secretary the authority to make that determination on a case-by-case basis. FWS is not required to explicitly define "essential"; rather, it must explain its considerations for assessing what areas are essential. *See Cape Hatteras Access Pres. Alliance* ("*CHAPA*") *v. U.S. Dep't of the Interior*, 344 F. Supp. 2d 108, 120 (D.D.C. 2004) (rejecting plaintiffs' argument that FWS was required to define "occupied"). FWS did so here: it applied a rational interpretation of "essential" and provided a reasonable explanation for its determination that Unit 1 is essential for the conservation of this highly endangered species. Therefore, its determination must be upheld as a permissible interpretation of the statute under *Chevron*. *See id.*; *see also Texas Oil & Gas*, 161 F.3d at 934.

After reviewing the June 2010 proposed rule, all peer reviewers noted that, in their expert opinion, the already proposed designation was inadequate to ensure the conservation of the frog. DSoF ¶¶43-44. They also noted the importance of spreading populations out over a wider geographic area to decrease the risk that the frog will go extinct due to localized threats, such as droughts, disease, and pollution. *Id.* ¶¶44-45, 47. Given the "high risk of extirpation from stochastic events," FWS determined that the already proposed habitat was inadequate to ensure the conservation of the frog and began considering sites throughout the frog's historic range. *Id.* ¶¶48-63. In identifying areas that are essential for the conservation of the frog, FWS considered the following criteria: "(1) The historic distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland pine forest in sufficient quantity around

each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland sites; and (5) multiple isolated wetlands in upland habitat that would allow for the development of metapopulations." 76 Fed. Reg. at 59780-81.

FWS considered the best available scientific information on sites throughout the frog's range, but could not identify any locations outside Mississippi that contained all of these elements or even all three PCEs. DSoF ¶53 "As a result of the rarity of open-canopied, isolated, ephemeral ponds within the historic range of the dusky gopher frog, and their importance to the survival of the species, identifying more of these ponds was the primary focus of" FWS' analysis of potential sites. *Id.* ¶50; *see also* ¶¶45-51; R2408 (although very little longleaf pine habitat currently exists in the frog's range, it is easier to restore terrestrial habitat than it is restore or create breeding ponds). In FWS' expert judgment, the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species. Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in" the frog's recovery. 77 Fed. Reg. at 35124.

A peer reviewer suggested that FWS consider Unit 1 based on the fact that it contains at least two historical frog breeding ponds and on the results of that peer reviewer's research and visits to those ponds in recent years. DSoF ¶56. The same peer reviewer and a FWS biologist with over 20 years of experience visited the area, "assessed the habitat quality of ephemeral wetlands in [Unit 1] and found that a series of five ponds contained the habitat requirements for PCE 1." 77 Fed. Reg. at 35123. The ponds were "intact and of remarkable quality." DSoF ¶59; *see also* Exhibit 1. Moreover, FWS found that the "five ponds [in Unit 1] are in close proximity to each other, which provides metapopulation structure[8] and increases the unit's value to the long-term survival and recovery of the frogs over an area with a single breeding pond." 77 Fed. Reg. at 35124; *see also id.*

[8] A metapopulation structure is defined as neighboring local populations close enough to one another that dispersing individuals could be exchanged at least once per generation, i.e., allowing for gene flow among local populations. 76 Fed. Reg. at 59778. Historically, frog populations were locating within metapopulations. R1554.

at 35132; 35133 ("Multiple breeding sites protect against catastrophic loss at any one site and provide opportunity for recolonization. This is an especially important aspect of critical habitat for [the frogs] due to their limited population numbers."). FWS determined that "the five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere within the historic range." 77 Fed. Reg. at 35124. FWS determined that Unit 1 is essential to the conservation of the frog "because it provides: (1) Breeding habitat for the [frog] in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the [frog]; and (3) geographic distance from extant [frog] populations, which likely provides protection from environmental stochasticity."*Id*. FWS provided a detailed, rational explanation for its determination, and that determination is entitled to deference.

Reading additional requirements into the ESA that do not exist, Markle argues that FWS cannot identify what habitat is essential to the conservation of the frog without first identifying the "point" at which the frog would be considered conserved. Br. at 10. Plaintiff relies solely on the holding from a district court decision that was explicitly rejected by the Ninth Circuit. *See Home Builders Ass'n v. FWS*, 616 F.3d 983, 989 (9th Cir. 2010) (rejecting court's adoption of this argument "because it lacks legal support and is undermined by ESA's text"). Plaintiff's argument was also rejected in *Arizona Cattle Growers v. Kempthorne*. 534 F. Supp. 2d 1013, 1025 (D. Ariz. 2008) ("While tempting in its logical simplicity…the language of the ESA requires a point of conservation to be determined in the recovery plan, not at the time of critical habitat designation."). The ESA requires the Secretary to develop and implement a recovery plan in which it identifies, "to the maximum extent practicable," "objective, measurable criteria" for determining the point at which the species will be conserved, but that requirement is set forth in a different subsection of the statute, 16 U.S.C. § 1533(f)(1)(B)(ii). No similar requirement is mentioned in the provisions related to designating critical habitat, *see id.* § 1533(b)(2); 534 F. Supp. 2d at 1025 (noting that a "negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute" (quoting *Hamdan v. Rumsfeld*,

548 U.S. 557, 578 (2006))). Had Congress intended FWS to define recovery criteria before designating critical habitat it would have stated so.

Markle does not address FWS' analysis beyond vague generalities, let alone establish that the bases for FWS' determination were arbitrary and capricious. FWS made the required finding that, based on the best available science, Unit 1 is essential for the conservation of the frog, and that finding is well-supported by the record and entitled to deference.

IV. Unoccupied Areas Need not Contain PCEs to be Designated

Plaintiff asserts, without support, that presence of the requisite PCEs is necessary for designation of critical habitat. Br. at 9. Markle's interpretation of the requirements for designating critical habitat contradicts the plain language of the ESA and lacks any support in the relevant case law. The ESA defines "critical habitat" as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). In other words, critical habitat may consist of "occupied" areas, *id.* § 1532(5)(A)(i), and "unoccupied" areas, *id.* § 1532(5)(A)(ii). Here, Markle concedes that the frog was not present in Unit 1 at the time of the frog's listing in 2001, Br. at 5, and thus, on its face, subsection (i) does not apply. Rather, Unit 1 is an area outside the geographic area occupied by the species at the time it was listed, and thus subsection (ii) provides the applicable standard.

The statutory language is unambiguous: there are two types of critical habitat, each with a separate standard and scope of analysis. To designate "occupied" habitat, FWS must identify features in the area that are essential to the conservation of the species, whereas, to designate "unoccupied" habitat, FWS must determine that the area itself is essential to the conservation of the species. Moreover, the ESA makes clear that unoccupied areas designated as critical habitat do not need to contain any PCEs. It is a well-established principle of statutory construction that,

"[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Had Congress intended to restrict [this subsection as Petitioner suggests], it presumably would have done so expressly as it did in the immediately following subsection…."); *see United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972). The fact that Congress specifically included language requiring an assessment of physical and biological features in subsection (i) but excluded that language in subsection (ii) shows that Congress intentionally omitted the requirement of a showing of PCEs for designating unoccupied areas. As Congress must have recognized, depending on the specific needs of and threats to a listed species, areas that do not contain PCEs at the time of designation may still be essential to the conservation of the species.

As a practical matter this makes sense. The purpose of the ESA is to conserve listed species by, in part, protecting their habitat. 16 U.S.C. § 1531(b). If the biggest threat to a critically endangered species is the destruction of habitat, as is the case with the frog, it does not make sense to hamstring FWS' efforts to conserve the species by limiting the designation of habitat to only those areas that contain optimal conditions for the species. Presumably, if such habitat was readily available, the frog would not be reduced to 100 individuals. *Cf. Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1275 (11th Cir. 2007) (rejecting plaintiff's Commerce Clause challenge, stating "[u]nder the Coalition's theory, Congress is free to protect a commercially thriving species that exists in abundance across the United States because it has economic worth, but once economic exploitation has driven that species so close to the brink of extinction that it desperately needs the government's protection, Congress is powerless to act.").

Plaintiff not only fails to identify any support for its novel interpretation of the statute, but it also fails to mention that this argument has been rejected. *See Fisher v. Salazar*, 656 F. Supp. 2d 1357, 1368 (N.D. Fla. 2009) (holding that "FWS was not required to identify PCEs" to designate unoccupied habitat)). Markle relies on *Alaska Oil & Gas Ass'n v. Salazar* ("*AOGA*"), 916 F. Supp. 2d 974 (D. Alaska 2013), which is inapposite because the designation at issue in that case included

only occupied habitat and, thus, was based on a different standard, 16 U.S.C. § 1532(5)(A)(i). Markle's reliance on *Arizona Cattle Growers* is likewise misplaced. Br. at 13. As an initial matter, that case did not involve a challenge to a critical habitat designation. 273 F.3d 1243-44 (9th Cir. 2001). Markle quotes in part the court's discussion on the designation of unoccupied habitat and once again omits key language in its quotation. Br. at 13. In fact, the court, referring to the designation of unoccupied habitat, 16 U.S.C. § 1532(5)(A)(ii), stated "[a]bsent this procedure, however, there is no evidence that Congress intended to allow [FWS] to regulate any parcel of land that is merely capable of supporting a protected species." 273 F.3d at 1244 (emphasis added).

Markle's remaining arguments also lack merit. Without citation, Markle claims that Unit 1 is "incapable" of supporting a protected species. Br. at 13. As is evident by the plain language of the ESA (and Plaintiff's failure to cite any support for its claim), there is no requirement that unoccupied areas be in optimal condition to conserve the species at the time of designation. To the extent that Plaintiff argues the frog could not survive in Unit 1, that statement is incorrect and the inquiry irrelevant. In any event, as discussed in section III(a), *supra*, the breeding habitat in Unit 1 is in very good condition and could support the frog's conservation *today*.[9] Moreover, the uplands in Unit 1 contain underground refugia that would allow for survival of the species, which is a key component of PCE 2. DSoF ¶66. Finally, the uplands are restorable to support the *conservation* of the species with reasonable effort. *Id.* ¶65. Thus, Markle's assertion is simply incorrect.

Without discussion or support, Markle also argues that the designation of critical habitat is imprudent in this case because it would "not be beneficial to the species." Br. at 13. FWS has determined that, not only is Unit 1 beneficial to the frog, but it is essential to the species' conservation. Moreover, Markle does not address, let alone specifically challenge FWS' prudency determination, which the ESA and implementing "regulation clearly show…merely sets the outer bounds in determining areas to designate." *AOGA*, 916 F. Supp. 2d at 996 (rejecting plaintiffs'

[9] Markle is wrong in suggesting that Unit 1 does not contain any PCEs. Br. at 12. FWS found that Unit 1 contains all the physical or biological features of PCE 1 (ephemeral ponds).

contentions that FWS must make express prudency finding). Markle's argument lacks any merit and must be rejected.

Markle also argues that if the ESA prohibits FWS "from designating all areas that *can* be occupied by the species," then it follows that the Secretary cannot designate *any* geographic area that "cannot be occupied by the species." Br. at 13-14. Besides employing faulty logic, Markle's argument contains several fundamental flaws. First, Markle cited 16 U.S.C. § 1532(5)(C), which states in its entirety: *Except in those circumstances determined by the Secretary*, critical habitat shall not include the entire geographical area which can be occupied by [the species]. (emphasis added). Thus, the statutory basis undermines, rather than supports, Markle's novel theory. Markle's unsupported argument also equates "can be occupied" with the presence of all identified PCEs, thereby ignoring the clear distinction Congress made between the definition of occupied and unoccupied habitat, as discussed in more detail above. *See Russello*, 464 U.S. at 23. Additionally, as discussed above and established by the record, Unit 1 *is* capable of supporting the frog and, thus, *can* be occupied by the species.[10] *See* DSoF ¶¶ 59, 61, 62, 66. Unit 1's breeding habitat is in excellent condition and, in FWS' expert opinion, the uplands habitat can be restored with reasonable effort. As the *Arizona Cattle Growers* court explained in the passage cited by Markle, Congress provided a mechanism for designating such habitat where it is essential to the conservation of the species. 273 F.3d at 1244.

Markle also argues without support that "essential" should be defined by whether Landowner Plaintiffs intend to manage the habitat for the benefit of the endangered species. Br. at 12. To the contrary, the ESA mandates the use of the "best available science" to determine whether habitat is essential. 16 U.S.C. § 1533(b)(2). The fact that Landowner Plaintiffs choose not to maintain the habitat for the benefit of the frog does not make Unit 1 less essential to this frog; rather, that fact simply means that this highly endangered species is that much closer to extinction. Markle's reading of the statute would leave FWS powerless to act where the only remaining habitat essential

[10] Federal Defendants reiterate that the frog could survive in Unit 1. However, with only 100 frogs left in the wild, FWS would not risk translocating frogs in less than optimal conditions.

to the conservation of the species is located on private land. The ESA imposes no such limitation.

The absence of a requirement to show that unoccupied habitat contains all PCEs does not lessen the standard for designating such habitat. As the *CHAPA* court explained, designation of unoccupied habitat is a "more extraordinary event" because, by regulation, such designations are prohibited unless designation of occupied land, which must contain the identified PCEs, is insufficient. 344 F. Supp. 2d at 125. FWS made that reasonable determination here. Although not required by the ESA for designation, Unit 1 not only contains PCE 1—the frog's breeding habitat—but the five breeding ponds in Unit 1 represent the *best breeding habitat anywhere in the frog's historic range*, a fact that Markle does not seriously challenge.[11] 77 Fed. Reg. at 35124 (emphasis added). The frog is currently limited to one viable breeding population occurring at one pond. Because this highly endangered frog cannot survive without breeding habitat, which has very specific requirements that are both uncommon and difficult to recreate, FWS reasonably determined that Unit 1 is essential to the conservation of the species. Plaintiff fails to meet its high burden of showing that this finding was arbitrary or capricious. FWS' designation of Unit 1 as critical habitat is within the statutory definition of critical habitat, well supported by the record and best available science, and is entitled to deference.

V. FWS Considered All Potential Economic Impacts to Unit 1

The ESA only requires FWS to "take into consideration" probable economic and other impacts, before designating critical habitat. 16 U.S.C. § 1533(b)(2). FWS fulfilled its statutory obligation, and Markle does not argue to the contrary. Furthermore, FWS appropriately relied on the "baseline" method to assess the economic impacts and, in any event, as to Unit 1, attributed all potential impacts in Unit 1 to the designation. Thus, the results of the incremental analysis and Plaintiff's preferred coextensive analysis would be the same.

[11] Markle provides no record support for its baseless claim that Unit 1 does not contain PCE 1. Br. at 15. It is unclear what Markle means by "speculative" habitat because no such term exists, but the record shows that this breeding habitat is "intact and of remarkable quality" and frogs could be translocated there with the Landowners' permission.

a. The Method Used To Analyze Economic Impacts is Irrelevant; Unit 1 is Unoccupied

Plaintiff disagrees with FWS' use of the "baseline" method for analyzing economic impacts, insisting that FWS should have considered those impacts co-extensive with ESA listing as required by the Tenth Circuit. *N.M. Cattle Growers Ass'n* ("*NMCG*") *v. FWS*, 248 F.3d 1277 (10th Cir. 2001). The Court need not reach this issue because, in the absence of any frogs in Unit 1, and thus any impacts related to ESA listing, FWS attributed all potential economic impacts in Unit 1 to the designation. R6626 ("Because this unit is unoccupied by the gopher frog, limitations on development would be attributable to the critical habitat designation alone and therefore would be considered incremental impacts."). The "baseline" method focuses on the costs attributable solely to the designation of critical habitat above and beyond the baseline costs. 77 Fed. Reg. at 35140. The "baseline" costs are the quantified impacts of conservation protections for the frog that are already in place, such as ESA listing, and that would be incurred regardless of whether critical habitat is designated. *Id*. Where, as here, the designation is of unoccupied habitat, there are no impacts related to listing, as Markle concedes. Br. at 7 (emphasizing, "[w]ere it not for the designation of Unit 1 as critical habitat, Markle would not be subject to the ESA at all because the gopher frog is not found in Unit 1").

Even if the Court considers Markle's argument, FWS reasonably relied on the "baseline" method to identify and assess potential economic impacts. The ESA requires the agency to "tak[e] into consideration the economic impact" of designation, but does not mandate any particular method of analysis. 16 U.S.C. § 1533(b)(2); *see also Fisher*, 656 F. Supp. 2d at 1368. FWS has issued a final rule, after notice and comment, revising the ESA regulations on impact analyses conducted for critical habitat designations and formally adopting the "baseline" method for analyzing economic impacts. 78 Fed. Reg. 53058, 53059.[12] Formal agency actions, such as those resulting from notice-and-comment rulemaking, generally warrant *Chevron* deference. *Christensen*

[12] That final rule, which Markle does not challenge here, thoroughly explains the genesis behind the Tenth Circuit decision and justification for adopting the "baseline" approach for economic impact analyses. *Id*. at 53062.

v. Harris Cnty., 529 U.S. 576, 587 (2000).

Additionally, the baseline method has been approved by the U.S. Office of Management and Budget for assessing the costs of regulations. R6639. Moreover, courts outside the Tenth Circuit have approved the baseline method and rejected the co-extensive approach. *See Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1173 (9th Cir. 2010) (describing the baseline approach as "more logical than the co-extensive approach"); *Fisher*, 656 F. Supp. 2d at 1371 ("To the extent the Tenth Circuit's co-extensive approach permits consideration of costs not attributable to the designation, it is inconsistent with the mandate of the ESA."); *CHAPA*, 344 F. Supp. 2d at 130 ("[FWS] must not allow the costs below the baseline to influence its decision to designate or not designate areas as critical habitat.").

With little elaboration, Markle urges the Court to adopt the Tenth Circuit's approach, but fails to mention that the circumstances behind that court's decision no longer exist and, for that reason, courts outside the Tenth Circuit have not adopted that Circuit's approach. *See, e.g*, *Fisher*, 656 F. Supp. 2d at 1368-71 (thoroughly explaining *NMCG* and the court's decision to reject the Tenth Circuit's approach). One court described the Tenth Circuit's holding as follows:

> Apparently hamstrung by its inability to consider the validity of 50 C.F.R. § 402.02, the Tenth Circuit found another way to require the Service to perform a more rigorous economic analysis. This is an instance of a hard case making bad law.

CHAPA, 344 F. Supp. 2d at 130. After *NMCG* was decided, the Ninth Circuit invalidated 50 C.F.R. § 402.02, *Gifford Pinchot Task Force v. FWS*, 378 F.3d 1059 (9th Cir. 2004), thereby calling into question the continuing validity of the Tenth Circuit's decision.

The circumstances before this Court are exactly the opposite of those before the Tenth Circuit, which led that Court to reject the economic impacts analysis prepared for that designation. *See* 78 Fed. Reg. at 53068 (noting that an economic analysis of the designation of unoccupied habitat "may more frequently identify higher probable impacts [because] any project modifications stemming from [an ESA Section 7] consultation process would be due solely to the designation of critical habitat and the requirement of avoiding its adverse modification, because the species is not present in the area"). Here, all potential economic impacts in Unit 1 were attributed to the

designation of critical habitat alone and, thus, the potential economic impacts would be the same whether quantified using the baseline method or the coextensive method. Accordingly, the Court should reject Plaintiff's arguments.

Markle also attempts to discredit the approach by asserting that "the provision requiring the consideration of all relevant economic impacts" is the "most significant provision in the entire [ESA]." Br. at 18. It is unclear how this statement supports Markle's argument, but in any event, Markle conveniently replaced the word "bill" in the original text with "ESA."[13] In fact, the legislative history cited by Markle pertains to the 1978 ESA amendments and the representative was explaining his opinion that of the provisions included in the House bill, the provision requiring the Secretary to consider the economic impact of designating critical habitat was the most significant. *Id.* Markle also makes an unsupported claim that *Bennett v. Spear*, 520 U.S. 154 (1997), mandates the Tenth Circuit's approach. In *Bennett*, the Supreme Court reiterated the need to take into consideration economic impacts, where provided under the ESA, but Plaintiff fails to show where in the decision the Supreme Court mandated any particular approach. The baseline method appropriately considers economic impacts as required by the ESA. In light of this case law and the deference that must be given to an agency's interpretation of a statute it administers, the Court should approve the "baseline" method for analyzing economic impacts.

b. The Decision Not to Exclude Unit 1 is Unreviewable and Within FWS' Discretion

The plain language of the ESA and implementing regulations make clear that FWS' only obligation is to "consider" economic impacts, an obligation FWS carried out. Markle does not argue that FWS failed to consider the potential economic impacts from the designation of Unit 1, nor could it persuasively do so. The Rule and record reflect extensive consideration of potential impacts to Unit 1 and, thus, FWS fulfilled its statutory requirement. Instead, Markle improperly asks the Court to weigh the potential economic impacts of the designation and determine that Unit 1 should have been excluded, a task Congress left entirely within FWS' discretion. Because FWS'

[13] Legislative History of the Endangered Species Act of 1973, as amended in 1976, 1977, 1978, 1979, and 1980: together with a Section-by-Section Index (Comm. Print) (1982) at 1221.

decision not to exclude Unit 1 is unreviewable, the Court should reject Markle's argument.

Under the APA, agency actions "committed to agency discretion by law" are unreviewable. 5 U.S.C. § 701(a)(2). An agency action is committed to its discretion if the underlying "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Here, Congress provided a standard for assessing a decision to exclude an area from critical habitat—the balancing test that Markle refers to. However, Congress did not provide a standard for assessing FWS' decision *not* to exclude an area. Thus, this decision is committed to agency discretion by law, and the APA precludes any court review of FWS' decision. *See AOGA*, 916 F. Supp. 2d at 994[14]; *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010); *see also Building Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, No. 11-4118, 2012 WL 6002511, at *7 (N.D. Cal. Nov. 30, 2012); *Home Builders Ass'n v. FWS*, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006), modified on other grounds, 2007 WL 201248 (E.D. Cal. Jan. 24, 2007). Because FWS' decision not to exclude Unit 1is unreviewable, Markle's argument must be rejected.

Courts addressing this issue have agreed that FWS is not required to balance the conservation benefits of designation against the benefits of exclusion. *See AOGA*, 916 F. Supp. 2d at 994 ("The need to balance the benefits of exclusion versus inclusion arises only when the Service decides to exclude an area, not include one."); *Building Industry Ass'n*, 2012 WL 6002511, at *5; *Fisher*, 656 F. Supp. 2d at 1368. Markle does not cite any support to the contrary. In "taking into consideration" the impacts of the designation, FWS "is not required to give economics or any other 'relevant impact' predominant consideration in [its] specification of critical habitat." H.R. Rep. No. 95-1625, at 17 (1978), as reprinted in 1978 U.S.C.C.A.N. 9453, 9467. Instead, "[t]he consideration and weight given to any particular impact is completely within the Secretary's discretion." *Id.* (emphasis added).

[14] Markle cites *AOGA* as support for its assertion that FWS' failure to exclude Unit 1 due to potential economic impacts was arbitrary and capricious. Br. 19-20. However, the district court in that case rejected the very arguments made by Markle in this case. 916 F. Supp. 2d at 994.

Moreover, the plain language of the statute provides that, upon considering economic and other impacts of the designation, FWS "may"—but is not required to—"exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," unless exclusion will result in the extinction of the species. 16 U.S.C. § 1533(b)(2); *see also* R1826, 1839 (Weyerhaeuser conceding FWS' "broad discretion" to exclude areas); 1820 (Poitevent Landowners urging Secretary to "exercise his discretion" under Section 4(b)(2) to exclude Unit 1). In other words, even if the benefits of exclusion outweigh the benefits of designating a particular area as critical habitat, FWS is authorized to exclude such areas, but has no obligation to do so. *See AOGA*, 916 F. Supp. 2d at 994; *Building Indus.*, 2012 WL 6002511, at *5.

Even if the Court decides that FWS' decision not to exclude an area is judicially reviewable, all that is required under the APA is for FWS to provide a non-arbitrary explanation for its decision. *See Texas Oil & Gas*, 161 F.3d at 933-34. Here, FWS had to take into consideration the fact that there are only about 100 frogs left in the wild and the primary cause of their highly endangered status is lack of habitat. Unit 1, in its totality, represents the best quality breeding habitat anywhere in the frog's historical range and the frog is on the verge of extinction. Moreover, FWS had already determined that Unit 1 was "essential" for the conservation of the frog. Thus, it was reasonable for FWS to determine that the benefit to the species of including Unit 1 outweighed the benefits of exclusion, particularly in this case in which any future development remains speculative.

Moreover, it is unlikely that the designation would result in $33.9 million in economic impact, which is the figure represented by the FEA's hypothetical Scenario 3 as discussed in the background section. If Landowner Plaintiffs continue to use their land for timber harvesting, as Mr. Poitevent has indicated a number of times they will do, then the designation would not affect them at all. *See* R2216; 2220; *see also* FEA 4-2, 4-3. Even if Landowner Plaintiffs should develop concrete plans to proceed with development projects located in part in Unit 1 and the project has a federal nexus, FWS has already indicated that if it finds that a federal agency action is likely to adversely modify critical habitat, it believes it could identify reasonable and prudent alternatives.

77 Fed. Reg. at 35123.

Thus, even if the Court concludes that determination is reviewable, Markle has not met its high burden of showing that the determination is arbitrary or capricious.

VI. FWS Has the Constitutional Authority to Designate Unit 1 as Critical Habitat

Markle does not seriously challenge FWS' constitutional authority to apply ESA Section 4 to designate Unit 1 as critical habitat for the frog. As an initial matter, Markle does not dispute that the passage of the ESA is a constitutional exercise of Congressional authority under the Commerce Clause. Br. at 4, 22. Moreover, Markle's brief is noticeably devoid of almost any discussion of the relevant case law, which is not surprising given that every Commerce Clause challenge to a provision or application of the ESA has been rejected. Six Circuits, including the Fifth Circuit, have evaluated and dismissed post-*Lopez* Commerce Clause challenges to applications of the ESA. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1272-73 (11th Cir. 2007); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262 (10th Cir. 2006) (affirming district court's analysis); *GDF Realty Invs., Ltd. v. Norton ("GDF")*, 326 F.3d 622, 639 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000). Markle makes little attempt to distinguish those cases from the present case. Finally, Markle's brief fails to even mention the factors that courts consider when assessing Commerce Clause challenges. Markle's claim is not unique, lacks merit and should be rejected.

Markle incorrectly asserts that, because Congress' authority to enact the ESA is derived from the Commerce Clause, each application of the ESA itself must regulate channels of interstate commerce, things in interstate commerce, or activities that substantially affect interstate commerce. Br. at 22. This is the standard for determining whether the underlying statute or regulation—in this case the ESA—is a constitutional exercise of the Commerce Clause. *Gonzales v. Raich*, 545 U.S. 1, 16 (2005).[15] Under *Gonzales*, the Court need only find that Section's 4

[15] Markle's reliance on *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), is misplaced because those cases involved challenges to single-

provision requiring designation of critical habitat is essential to the ESA, a comprehensive regulatory scheme that has a substantial relation to interstate commerce. *See id.* at 9 (upholding Congress' authority under the Commerce Clause to regulate noncommercial intrastate activity essential to a comprehensive regulatory scheme).

Every Circuit to have reached the issue, including the Fifth Circuit, has concluded that the ESA is a comprehensive scheme that has a substantial relation to interstate commerce. *Alabama-Tombigbee*, 477 F.3d at 1272-73; *see also San Luis*, 638 F.3d 1163; *GDF*, 326 F.3d at 639. Furthermore, it is clear from Congress' mandate that the Secretary designate critical habitat that Congress believed designation of such habitat to be one of the most important avenues for protecting endangered species. *See id.* § 1533(b)(2); *see also id.* § 1531(b). This seems particularly obvious in this case in which there at most 100 frogs left in the wild and their most significant threat is habitat destruction. Contrary to Markle's assertions, and as the ESA affirms, the purpose of designating critical habitat is to conserve a listed species. *See* 16 U.S.C. § 1531(a)(1) (Congress finding that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation").[16] Because ESA Section 4's mandate to designate critical habitat for listed species is an integral component of the ESA, this particular application of Section 4 is a constitutional exercise of Congress' authority and, therefore, FWS' authority under the Commerce Clause.[17] *See Alabama-Tombigbee*, 477 F.3d at 1272 (noting that "when a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under [the] statute is of no consequence").

Markle's remaining arguments lack merit. The fact that the frog currently exists only in

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subject statutes rather than an application of a comprehensive regulatory scheme as in *Raich*. *See* 545 U.S. 1, 38 (2005) (Scalia, J., concurring).

[16] Markle's assertion that the designation of Unit1, which FWS in its expert opinion believes will help ensure the survival of a highly endangered species, does not have a substantial effect, whether alone or in the aggregate, on the preservation of biodiversity lacks any merit.

[17] There is no requirement that FWS make an explicit finding that every application of the ESA regulates economic activity and Markle cites no support suggesting otherwise. *See* 545 U.S. at 26; *Alabama-Tombigbee*, 477 F.3d at 1272-73; *see also GDF*, 326 F.3d at 629.

Mississippi is irrelevant because the rule regulates certain activities set forth in ESA Section 7 affecting the frog's critical habitat, which FWS determined exists in two states—Mississippi and Louisiana. Markle also incorrectly states that courts that have upheld the constitutionality of the ESA have based their decisions on the conclusion that the particular application challenged regulated economic activity. Br. at 22; *see Alabama-Tombigbee*, 477 F.3d at 1276-77 (rejecting Commerce Clause challenge to an ESA Section 4 listing decision); *see also GDF*, 326 F.3d at 639 (noting that "non-commercial, intrastate activities must be 'essential' to an *economic* regulatory scheme's efficacy in order . . . for aggregation to be appropriate"). In sum, as the Supreme Court reaffirmed in *Raich*, "where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." 545 U.S. at 23 (citation omitted). The Rule is a constitutional exercise of Congress' authority under the Commerce Clause and must be upheld.

VII. NEPA Does Not Apply to Critical Habitat Designations

FWS' consistent position that critical habitat designations are not subject to NEPA was upheld by the Ninth Circuit in *Douglas County v. Babbitt*, 48 F.3d 1495, 1501-08 (9th Cir. 1995). The Ninth Circuit explained that NEPA analysis is not required because: (1) the ESA displaced the procedural requirements of NEPA with respect to critical habitat designation, (2) NEPA does not apply to actions that do not alter the physical environment, and (3) critical habitat designation serves the purposes of NEPA by protecting the environment from harm due to human impacts. *See id.* Further, the court found that NEPA should not be used as "an 'obstructionist tactic' to prevent environmental protection." *Id.* at 1508 (citing *Pacific Legal Found. v. Andrus*, 657 F.2d 829, 838 (1981)); *see also Building Indus.*, 2012 WL 6002511, at *7.[18]

[18] The process for designating critical habitat may also be considered the functional equivalent of a NEPA analysis, thus providing a further support for the principle that such designations are not subject to NEPA. *See Pacific Legal Found.*, 657 F.2d at 835 (noting in *dicta* that the "ESA may now provide the functional equivalent of an impact statement when a critical habitat is designated"); *see also Texas Comm. on Natural Res. v. Bergland*, 573 F.2d 201, 207 (5th Cir. 1978) (noting that courts have held that "NEPA compliance has not been required when the agency's organic legislation mandated specific procedures for considering the environment that were 'functional equivalents' of the impact statement process.").

The only other circuit to have addressed this precise issue was the Tenth Circuit. *See Catron Cnty. Bd. of Comm'rs v. FWS*, 75 F.3d 1429, 1436-39 (10th Cir. 1996). Significant to the court's ruling was its finding that, unlike in the *Douglas County* case, the designation of critical habitat would harm the environment by limiting the county's ability to engage in flood control efforts. *See id.* at 1437-38; *see also CHAPA*, 344 F. Supp. 2d at 136 (finding that NEPA applied to a critical habitat designation, in part, because the designation would "significantly affect the quality of the human environment"). Although the Fifth Circuit has not addressed whether NEPA applies to critical habitat designations, it has held that NEPA does not apply to actions that do not alter the physical environment. *See Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 679 (5th Cir. 1992) ("[T]he acquisition of the [negative conservation] easement by [FWS] did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an EIS."); *see also City of Dallas v. Hall*, 562 F.3d 712, 721-23 (5th Cir. 2009) (holding that setting an acquisition boundary for a wildlife refuge did not alter the physical environment and therefore did not require the preparation of an EIS).

Here, the designation of critical habitat does not alter the physical environment and does not require any action by private landowners. *See* 77 Fed. Reg. at 35128. Further, Plaintiff has made clear that it will never authorize FWS to implement management measures to improve the habitat. Rockwell Decl. ¶ 7. Therefore, there is no basis for Plaintiff's assertion that FWS' action will affect the environment. Moreover, Plaintiff's land is unoccupied, and therefore the only way that Plaintiff might be required in the future to take management actions to protect the frog would be if Plaintiff were to undertake a project with a federal nexus. *See* 16 U.S.C. § 1536; *see also* Background section I, *supra*. If that were to occur, an appropriate NEPA analysis could be conducted at that time.

CONCLUSION

For the reasons stated above, the Court should deny Markle's Motion for Summary Judgment and grant Federal Defendants' Cross-Motion for Summary Judgment.

DATED this 21st day of February, 2014.

Respectfully Submitted,

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EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS

MARKLE INTERESTS, LLC, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICE, et al., Defendants.	CIVIL ACTION CASE NO. 13-234 PERTAINS TO 13-234 SECTION: F(1) JUDGE: MARTIN L.C. FELDMAN MAG. JUDGE: SALLY SHUSHAN **CERTIFICATE OF SERVICE**

I hereby certify that today I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to all counsel of record.

/s/ Mary Hollingsworth
MARY HOLLINGSWORTH

UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF LOUISIANA

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DEFENDANTS' RESPONSE TO MARKLE'S STATEMENT OF MATERIAL FACTS AND DEFENDANTS' STATEMENT OF MATERIAL FACTS IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to L.R. 56.2, Defendants file this response to Plaintiff's Statement of Material Facts, ECF No. 69-2, and hereby provide a statement of material facts, as contained in the administrative record[1] filed on August 19, 2013, in support of their Cross-Motion for Summary Judgment. For the reasons stated below, however, there are no issues of material fact in this case.

Markle seeks judicial review of agency actions pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. The Court's task is to review the administrative record that was before the federal agency at the time it made the challenged decision to determine whether, as a matter of law, the record supports the agency's decision. 5 U.S.C. § 706; *Fla. Power & Light Co. v. Lorion*,

[1] Citations to the U.S. Fish & Wildlife Service's ("FWS") administrative record are cited as "R####."

470 U.S. 729, 743-44 (1985). Thus, there are no material facts for the Court to resolve in the first instance. The facts necessary for the resolution of this case are set forth in the administrative record already lodged with the Court. The "Statement of Material Facts" submitted by the parties should be viewed as their summary and characterization of materials in the record that are relevant to their legal arguments under the APA standard of review.

1. Federal Defendants do not dispute that Robin Rockwell's declaration makes that assertion. Otherwise, Federal Defendants are without information or knowledge sufficient to form a belief as to the truth of these assertions.

2. Undisputed.

3. Disputed in part. As Markle has already conceded in its Memorandum, unoccupied areas designated as critical habitat are not per se subject to regulation. ECF No. 69-1 ("Br.") at 3. Critical habitat receives protection under Endangered Species Act ("ESA") Section 7, which requires federal agencies to consult with the expert agency, in this case FWS, on any actions "authorized, funded, or carried out by" the agency to ensure that their actions are not likely to destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). If an action has no federal nexus, i.e., it is not authorized, funded, or carried out by a federal agency, it is not affected by a critical habitat designation. *See Fisher v. Salazar*, 656 F. Supp. 2d 1357, 1359 (N.D. Fla. 2009); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 115 (D.D.C. 2004). Markle's actions are not otherwise subject to any other ESA provisions. Nor is Plaintiff presently at risk of any ESA civil or criminal liability because there are no frogs present in Unit 1, as all parties concede.

With regard to the possible economic impacts, Defendants do not dispute that one of the three hypothetical scenarios analyzed within the FEA estimated the economic impacts to be $33.9 million. However, the final rule made clear that, although this scenario is possible, it is unlikely, noting that in FWS' experience, virtually all projects can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. Reasonable and prudent alternatives must, by definition, be economically feasible and within the scope of authority of the federal

agency involved in the consultation. 77 Fed. Reg. 35118, 35123 (June 12, 2012).

4. Undisputed.

5. Disputed. Unit 1 contains physical and biological features essential to breeding and reproduction, represented by Primary Constituent Element ("PCE") 1. 76 Fed. Reg. 59774, 59781 (Sept. 27, 2011).

6. Disputed. Unit 1 contains the habitat characteristics for PCE 1. 76 Fed. Reg. 59781.

7. Disputed in part. The area within Unit 1 is currently suitable frog breeding habitat. *See* R1567 at 1568; R1090 at 1099.

8. Disputed in part. First, "transplanting of frogs" has no effect on habitat suitability. Second, with regard to "change of land use," the statement is disputed in part as the land could be used for timber harvesting with some modifications to provide protections for the frog. *See, e.g.*, 66 Fed. Reg. 62993, 62997 (Dec. 4, 2001) ("Timber management that avoids adverse effects to important habitat characteristics is compatible with maintenance of the [frog,] as evidenced by its continued occurrence on the DeSoto National Forest"). With regard to the "controlled burns," although prescribed burning is the preferable method of maintaining upland habitat for the frog, it is not the only method available. R2460 (example of trees being cut rather than burned); *see also* 77 Fed. Reg. 35129 ("Optimal habitat is created when management includes frequent fires…."). Finally, as to "revegetation," the statement is disputed as the Rule does not identify revegetation as necessary to restore the site, and Plaintiff does not provide a citation to a page in the Rule that states the contrary.

9. Undisputed.

10. Undisputed.

11. Statement disputed. Markle's statement is not a fact; rather, it is argumentative. In any event, the breeding ponds in Unit 1 are suitable habitat in their current condition. *See* 77 Fed. Reg. 35123; R1567 at 1568; R1090 at 1099.

12. Statement partially disputed. Plaintiff is referring to the ESA's definition of "critical habitat," which states the following:

The term "critical habitat" for a threatened or endangered species means--

> **(i)** the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> **(ii)** specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A) (emphasis added).

13. Undisputed.

14. Disputed. To the extent that Plaintiff intended to assert that the Secretary "did [not]" determine a viable population or habitat size for the frog, that statement would be undisputed.

15. Undisputed.

16. Statement partially disputed. The figure cited by Markle refers to the estimate in the third hypothetical set out in the FEA. The final rule made clear that this scenario, although possible, is unlikely to occur because in FWS' experience "virtually all projects…can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. Reasonable and prudent alternatives must, by definition, be economically feasible and within the scope of authority of the Federal agency involved in consultation." 77 Fed. Reg. 35123. Moreover, Landowner Plaintiffs' statements also establish that this scenario is unlikely. In that context, FWS considered the possible economic impacts and, in its discretion, decided not to exclude Unit 1 from the designation. 77 Fed. Reg. 35141. Plaintiff's statement also represents one of its legal arguments, to which Federal Defendants respond in their brief. *See* Argument section V(b).

17. Undisputed.

18. Disputed in part. The Rule states that Landowner Plaintiffs' economic activities that have a federal nexus may be regulated pursuant to ESA Section 7. *See* 77 Fed. Reg. at 35122-23.

19. Undisputed.

20. Disputed in part. According to Landowner Plaintiffs, current economic activity affects

gopher frog habitat. *See, e.g.*, ECF No. 67-1 at 4 ("Moreover, as those [pine] plantations grow, they will become more closed-canopy in nature."). This habitat has been determined to be essential for the conservation of the frog. 77 Fed. Reg. 35124. Thus, actions that negatively affect the habitat the frog needs to recover from its endangered status necessarily affect the frog.

Federal Defendants' Statement of Facts

I. The dusky gopher frog ("frog")—taxonomy

1. The dusky gopher frog was first described in 1940 as a new species of frog, *Rana sevosa*, that inhabited the lower coastal plain between the Mississippi River in Louisiana and the Mobile River delta in Alabama. R15; 66 Fed. Reg. 62993 (Dec. 4, 2011).

2. Subsequent studies determined that the dusky gopher frog was a subspecies of the gopher frog, *Rana capito sevosa*, and later, a subspecies of the crayfish frog, *Rana areolata sevosa*. 66 Fed. Reg. 62993.

3. Based on a genetic analysis published in 2001 just prior to the publication of the final listing rule, it was recommended that the Mississippi population of gopher frogs be considered a separate species, *Rana sevosa*, the dusky gopher frog. However, because the recommendation and supporting data had been published shortly before the issuance of the final listing rule, it was unclear if the suggested taxonomy would be accepted by the herpetological scientific community. 66 Fed. Reg. 62993.

4. In its final listing rule, FWS identified the gopher frog in Mississippi as the Mississippi gopher frog, *Rana capito sevosa*, a distinct population segment of the gopher frog, *Rana capito*. However, FWS stated that the listing determination would have been the same if the frog had been a distinct species, and stated that if the species name *Rana sevosa* was accepted by the scientific community, it would revise the name of the listed entity accordingly. 66 Fed. Reg. 62993.

5. In the proposed rule designating critical habitat for the frog, FWS acknowledged that the listed entity warranted acceptance as a species, *Rana sevosa*, and sought public comment on revising the List of Endangered Wildlife accordingly. However, FWS continued to identify the listed entity as the Mississippi gopher frog to avoid confusion with the other populations of *Rana*

capito having the common name dusky gopher frog. 75 Fed. Reg. 31387, 31388 (June 3, 2010).

6. FWS again specifically sought public comment on the proposed taxonomic and common name changes at the January 31, 2012 hearing that Mr. Poitevent attended. R2331.

7. In the final rule designating critical habitat for the frog ("Rule"), FWS adopted the proposal to revise the scientific name of the listed entity to acknowledge that it is a species, *Rana sevosa*. Based on recommendations received during the comment periods, FWS also changed the frog's common name from Mississippi gopher frog to dusky gopher frog. 77 Fed. Reg. 35118 (June 12, 2012). FWS amended the List of Endangered and Threatened Wildlife to reflect this change. *Id.* at 35145.

II. The dusky gopher frog—biology

8. Dusky gopher frog habitat includes both upland sandy habitats historically forested with longleaf pine and isolated temporary wetland breeding habitat, specifically isolated ponds, embedded within the forested landscape. 66 Fed. Reg. 62994.

9. Adult frogs leave the pond site after breeding during major rainfall events. Adults of both sexes use specific migratory corridors when exiting the breeding pond. 66 Fed. Reg. 62994.

10. Adult and sub-adult frogs spend the majority of their lives underground, using active and abandoned gopher tortoise burrows, abandoned mammal burrows, and holes in and under stumps as refugia. 66 Fed. Reg. 62994.

III. The dusky gopher frog—historic range, listing

11. The historic range of the species is from east of the Mississippi River in Louisiana to the Mobile River delta in Alabama. 66 Fed. Reg. 62993.

12. Historical records for the frog exist in two or possibly three parishes in Louisiana, six counties in Mississippi, and one county in Alabama. 66 Fed. Reg. 62994.

13. No dusky gopher frogs have been observed in Louisiana since 1967 or in Alabama since 1922. 66 Fed. Reg. 62994. *Compare* R500-03 (last observation in Louisiana was in 1965). The last known location in Louisiana is also the last known breeding pond for the species in Louisiana, the Sevosa pond located in Unit 1. 76 Fed. Reg. 59774, 59781, 59783 (Sept. 27, 2011); R500-03; 554-

57.

14. The frog was listed as endangered in 2001 based on the following listing factors: habitat destruction and modification due to fragmentation and conversion of the longleaf pine ecosystem, development, and fire suppression; and the fact that only one small population of the frog remained, increasing its vulnerability to the other threats. 66 Fed. Reg. 62997-62300.

15. Impediments to recovery include fragmentation of habitat, which precludes connectivity which is necessary for genetic variation and diversity, 75 Fed. Reg. 31392; small population size, caused by limited, isolated habitat, 75 Fed. Reg. 31395; and rarity of isolated ephemeral breeding ponds, 77 Fed. Reg. 35124.

IV. The dusky gopher frog—current range

16. At the time the frog was listed, only one population was known, centered on Glen's Pond located within DeSoto National Forest, Harrison County, Mississippi. 66 Fed. Reg. 62997; 75 Fed. Reg. 31396.

17. Between the time the species was listed and critical habitat was proposed, two more naturally occurring populations were discovered, and one additional population established through translocation, in Jackson County, Mississippi. 75 Fed. Reg. 31389, 31397.

18. The current range of the frog consists of one site in Harrison County (Glen's Pond) and three in Jackson County (Mike's Pond, McCoy's Pond, and TNC Pond), Mississippi. 77 Fed. Reg. 35133.

19. Glen's Pond is an upland, winter-filling, ephemeral pond with an open canopy located in a primarily longleaf pine ecosystem. Although most of the surrounding habitat is part of DeSoto National Forest, the land approximately 200 m north of the pond was managed as a pine plantation until 1999, when it was acquired by a private company for residential development. R871.

20. The Glen's Pond site supports the vast majority of dusky gopher frogs that currently exist in the wild. 77 Fed. Reg. 35136. Of the four occupied sites, it is the only one where measurable numbers of adult gopher frogs have been documented, ranging from 50 to 100 since the frog was listed. 66 Fed. Reg. 63000 (final listing rule; 100 adults); R961 at 963 (fewer than 100 adults);

R1020 at 1027 (89 adults, estimated). At the other three ponds (Mike's, McCoy, and TNC), no adult dusky gopher frogs have been observed, occasionally calling males have been heard, and the presence of at least two adult frogs could only be inferred on several occasions based on the presence of egg masses and tadpoles. R1020 at 1022, 1029; R1113 at 1126-27; R1358 at 1364.

21. The range of the frog has been reduced as a result of habitat destruction and modification. Longleaf pine forested habitat has been reduced to less than two percent of its original distribution. 66 Fed. Reg. 62997.

V. Post-listing management of the frog and proposed critical habitat designation

22. At the time of listing the frog, FWS found that designation of critical habitat was prudent and determinable, but it was unable to make a determination on critical habitat due to budget limitations. 66 Fed. Reg. 63000.

23. Recognizing the importance of seeking additional ponds that could be used as breeding sites, FWS has studied translocation of immature frogs to establish populations in unoccupied ponds for years. *See* R2453 at 2454; R2456. The location of additional habitat has been a priority for FWS since the species was listed. 75 Fed. Reg. 31389.

24. On November 27, 2007, the Center for Biological Diversity and Friends of Mississippi Public Lands brought a lawsuit challenging FWS' failure to timely designate critical habitat for the Mississippi gopher frog. 75 Fed. Reg. 31389; R2421.

25. The lawsuit was settled by a court-approved agreement in which FWS agreed to submit to the Federal Register a new prudency determination, and if designation was found to be prudent, a proposed designation of critical habitat, by May 30, 2010, and a final designation by May 30, 2011. 75 Fed. Reg. 31389; R2435.

26. Consequently, FWS published a prudency determination and proposed critical habitat rule in the Federal Register on June 3, 2010. 75 Fed. Reg. 31387.

27. The rule proposed to designate the 96 acres occupied at the time of listing and 1,861 acres unoccupied at the time of listing. 75 Fed. Reg. 31395.

28. FWS began its determination of which areas to propose as critical habitat for the frog with

an assessment of the critical life-history components of the frog, as they relate to habitat, to determine what portion of its range still contained the physical and biological features that are essential to the conservation of the species. FWS reviewed available information pertaining to historic and current distributions, life histories, and habitat requirements of the species. The analysis focused on the identification of ephemeral wetland habitats because they are requisite sites for population survival and conservation and their rarity is one of the primary reasons that the frog is endangered. 77 Fed. Reg. 35132.

29. In accordance with information quality requirements of the ESA and other authorities, FWS considered information from many different sources, including articles in peer-reviewed journals, scientific status surveys and studies, other unpublished materials, and experts' opinions or personal knowledge. FWS also requested comments or other information from concerned governmental agencies, the scientific community, industry, and other interested parties. 77 Fed. Reg. 35125 (response to Comment 20).

30. FWS determined that dusky gopher frogs require small, isolated, ephemeral, acidic, depressional standing bodies of freshwater for breeding; upland pine forested habitat that has an open canopy maintained by fire (preferably) for nonbreeding habitat; and upland connectivity habitat areas that allow for movement between nonbreeding and breeding sites. 77 Fed. Reg. 35132.

31. FWS considered the following criteria: (1) the historic distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland pine forest in sufficient quantity around each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland sites; and (5) multiple isolated wetlands in upland habitat that would allow for the development of metapopulations. 75 Fed. Reg. 31394.

32. Frog populations were historically located within metapopulations. R1539 at 1554.

33. FWS defined metapopulations as neighboring local populations close enough to one another that dispersing individuals can exchange gene flow at least once each generation. 76 Fed.

Reg. 59778.

34. Genetic variation and diversity within a species are essential for recovery, adaptation to environmental changes, and long-term viability, which in turn is founded on the existence of numerous interbreeding local populations throughout the range. 76 Fed. Reg. 59778.

35. Loss of metapopulations through fragmentation of habitat results in isolated local populations, which have a high probability of extinction. R1539 at 1554.

36. Connectivity of breeding and nonbreeding habitat must be maintained to support species survival, both within areas occupied by the species and between those areas and those not occupied by the species. This connectivity increases the likelihood of metapopulation persistence and recolonization of sites lost due to drought, disease or other factors. 76 Fed. Reg. 59778.

37. FWS identified four sites in Mississippi that were currently occupied by the frog, one of which (in DeSoto National Forest, Harrison County) was occupied at the time of listing. 75 Fed. Reg. 31394.

38. FWS found that the currently occupied habitat of the frog was highly localized and fragmented. With such limited distribution, the frog is at high risk of extinction and highly susceptible to stochastic events. Pond-breeding amphibians are particularly susceptible to drought, and isolated populations are highly susceptible to random events. Protection of a single, isolated, minimally viable population risks extirpation or extinction of the species as a result of harsh environmental conditions, catastrophic events, or genetic deterioration over several generations. To reduce the risk of extinction through these processes, FWS determined that it was important to establish multiple protected populations across the landscape. 75 Fed. Reg. 31394.

39. FWS used its own data, as well as surveys and reports prepared by other researchers and agencies of Mississippi, Louisiana, and Alabama, to search for locations with the potential to be occupied, by the frog, beyond the four occupied areas. After reviewing the available information in the three states, FWS determined that most of the potential restorable habitat was in Mississippi. 75 Fed. Reg. 31389.

40. The proposed critical habitat rule included, in addition to the four occupied units, seven

units that were unoccupied but were determined to be essential to the conservation of the frog. All seven units were located in Mississippi. 75 Fed. Reg. 31395-99.

VI. Public comment on the proposed critical habitat rule

41. In accordance with FWS policy published in the Federal Register on July 1, 1994 (59 Fed. Reg. 34270), the agency sought the expert opinions of seven knowledgeable and independent specialists regarding the proposed rule. The purpose of the peer review is to ensure that a proposed action is based on scientifically sound data, assumptions, and analyses. 77 Fed. Reg. 35119. The expertise of the peer reviewers included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. 77 Fed. Reg. 35125 (response to Comment 20); *see, e.g.*, R1539 (Richter, studied frog since 1995); R1101 (Pechmann, amphibian biologist). The peer reviewers were invited to comment during the public comment period on specific assumptions and conclusions regarding the proposed designation. Six of the peer reviewers submitted comments. 77 Fed. Reg. 35119.

42. All of the reviewers were supportive of the proposed rule to designate critical habitat. 77 Fed. Reg. 35119.

43. Many comments submitted by the peer reviewers during the public comment period, challenged the sufficiency of the 350 m upland habitat buffer around the breeding sites. R1511, 1543, 1567, 1652, 1656. The rule stated that the purpose of the buffer is to incorporate sufficient upland habitat, including where appropriate all associated PCEs, and to ensure connectivity between the ponds. *See* 75 Fed. Reg. 31395. Based on the comments, FWS changed the buffer to 650 m, which was the mean farthest distance movement from data collected during multiple studies of gopher frogs generally. 76 Fed. Reg. 59781. In the final rule, FWS reduced this buffer to 621 m, by using the median rather than the mean distance movement, which FWS believed to be more accurate. 77 Fed. Reg. 35120 (response to comment 2), 35134.

44. Several of the peer reviewers, as well as the Center for Biological Diversity, stated in their comments that FWS needed to go beyond the proposed critical habitat units in Mississippi and investigate sites in Louisiana and Alabama as well. R1537 at 1538; R1539 at 1541; R1567 at

1568; R1656 at 1658.

45. The most extensive rationale for this request was provided by Pechmann, who stated:

> [I]t is essential for the conservation of the species to designate critical habitat in Louisiana, and in Alabama if possible, in addition to the habitat proposed for designation in Mississippi. As noted in the proposed rule, climate change may lead to increased frequency and duration of droughts in the southeastern U.S. . . .*Rana sevosa* do not breed well when drought prevents the breeding pond from filling to an adequate depth . . . . Even if breeding occurs, juvenile recruitment fails or if drought causes the pond to dry before larvae can reach the minimum size for metamorphosis, as happens frequently at Glen's Pond . . . . Disease is also a threat to *R. sevosa*. . . . Due to the low number of remaining populations and its very restricted range, *R. sevosa* may be at risk of extirpation from events such as drought or disease which vary over space and time. Maintaining sites over the entire range of *R. sevosa* into which it could be translocated is essential to decrease the potential risk of extinction of the species from events such as these, and provide for the species' eventual recovery. Potential *R. sevosa* translocation sites must be spread out over as wide a geographic area as possible because events such as droughts and disease tend to be spatially autocorrelated. Therefore, *Rana sevosa* will be less at risk of extinction if populations of *R. sevosa* are established across its range in Louisiana and Alabama, rather than just in southern Mississippi.

R1568 (internal citations omitted)

In later comments, Pechmann elaborated: "Spreading populations out over a wider geographic area decreases the likelihood that the species will go extinct. Misfortunes such as droughts, diseases, and pollution are most likely to occur at the same time in nearby ponds than in ponds that are located far away from each other." R2315 at 2407 (comments at public hearing on critical habitat designation).

46. Peer reviewer Richter stated that, in his expert opinion, additional sites now unoccupied by the frog are "essential to the conservation of the species," and "absolutely necessary because without establishing new populations, the species will not recover." R1582.

47. A third commenter identified the necessity of multiple established breeding ponds for the frog: "[W]ithout other [besides Glen's Pond] well-established breeding ponds the [frog] will be at risk of being [wiped] out by a natural disaster, drought, or relatively newly discovered fungi that have been devastating to juvenile amphibians." R1585 (Blihovde).

48. FWS determined that recovery of the frog will not be possible without the establishment of additional breeding populations of the species. Isolated, ephemeral ponds that can be used as the

focal point for establishing these populations are rare, and this is a limiting factor in dusky gopher frog recovery. 77 Fed. Reg. 35124 (response to comment 16).

49. "[B]ecause [ephemeral] wetlands are very shallow, they are easily filled in and have been (sic) become very rare in the range" of the frog. "Gopher frogs require this type of wetland." R2315 at 2336 (hearing transcript).

50. As a result of the rarity of open-canopied, isolated ephemeral ponds within the historic range of the gopher frog, and their importance to the survival of the species, identifying more of these ponds throughout the species' range was the primary focus of FWS' analysis. 77 Fed. Reg. 35124 (response to comment 16).

51. High quality habitat would include several wetlands in close proximity to the forest to protect against extirpation at any one breeding site. R2337.

VII. Consideration of sites in Alabama

52. In investigating possible sites in Alabama, FWS determined that the only historic record for the frog in Alabama was from 1922 at a location in Mobile County near Mobile Bay. The upland terrestrial habitat at this location has been destroyed and replaced by residential development; no breeding site has ever been found; and the only ponds identified have been found to not contain habitat that would provide a conservation benefit for the frog. 77 Fed. Reg. 35124 (response to comment 17). The ponds contained woody shrubs and trees, were occupied by fish, occurred within farm fields, or were surrounded by structures. 77 Fed. Reg. 35124.

53. FWS has not been able to identify any areas in Alabama that are essential for the conservation of the frog. Additional possible ponds in Alabama were identified through remote sensing. 77 Fed. Reg. 35124, 35132-33. One researcher conducted field assessments of several sites, but was unable to locate any habitat that was suitable for the frog. 77 Fed. Reg. 35133.

VIII. Consideration of sites in Louisiana

54. As to Louisiana, the comments of one peer reviewer (Pechmann) specifically called to FWS' attention one site in Louisiana that became Unit 1 because of its history and suitability:

> The pond where *Rana sevosa* was last documented…in 1967, located near Florenville, retains the required characteristics necessary to serve as a breeding pond (PCE1) as described in the proposed rule. . . . Another pond located nearby also retains these characteristics. . . . Although the terrestrial habitat surrounding those ponds is currently in commercial pine plantations, it retains some stump holes and could be restored to suitable upland habitat for *R. sevosa* (PCE's 2 and 3) . . . .

R1568 (internal citations omitted).

55. Pechmann also commented that this unit "contains the best remaining collections of breeding ponds for gopher frogs in Louisiana and some of the best ponds available anywhere in the historic range of the frog. It also contains two ponds which historically supported gopher frogs." R2315 at 2408 (comments at public hearing on critical habitat designation).

56. Based on the best available science, FWS determined that the habitat characteristics of the wetlands in Unit 1 were consistent with those at Glen's Pond and, thus, the five ponds in Unit 1 contain PCE 1. 77 Fed. Reg. 35133 (noting that the Unit 1 ephemeral ponds were considered similar in appearance (water clarity, depth, vegetation) to ponds in Mississippi used for breeding by the frog). Because it was not possible to measure hydroperiod of all wetlands within the frog's historic range, FWS used wetland (hydrophytic) vegetation as a metric for hydroperiod, R392, which is standard practice in wetland delineation, using Glen's Pond as a reference, 77 Fed. Reg. 35133 (comparing vegetation at Unit 1 ephemeral ponds to that at the Mississippi breeding ponds). FWS also relied on peer reviewer comments, R1568, and research, R1097, 3099-3102, as well as site visits by a FWS biologist with over 20 years of experience analyzing such habitat. R392, 3080-82.

57. FWS found that habitat in Louisiana is distant from the extant populations of the frog in Mississippi. For this reason, the Louisiana site would likely be affected by different environmental variables than sites in Mississippi. Thus, the site would provide a refuge for the frog should the other sites be negatively affected by environmental threats or catastrophic events. 77 Fed. Reg. 35124 (response to comment 16).

58. Based on the information received from Pechmann, FWS sought permission from Weyerhauser, the lessee of the property and whom FWS believed owned the property, to inspect the site. R3072-73. FWS' stated purpose of the visit was "assessing the habitat quality in and

around the last known gopher frog pond and other nearby ponds." R3073. Weyerhauser approved the visit, R3072, and issued FWS a permit for the inspection, which stated that Weyerhauser was the owner of the property. R3077. It was not until after the site visit that Weyerhauser informed FWS that another party owned the property, and that Weyerhauser was a lessee. R3105.

59. FWS inspected the site that became Unit 1 in March 2011. Although the surrounding uplands are poor quality terrestrial habitat for the frog, the five ephemeral ponds were intact and of remarkable quality, and similar in appearance to ponds in Mississippi used for breeding by frogs. 77 Fed. Reg. 35133.

60. The same area was surveyed for gopher frogs in the 1990s and 2000s. During those visits, the ephemeral ponds were considered similar in appearance (water clarity, depth, vegetation) to ponds in Mississippi used for breeding by the frog. FWS' observations in 2011 indicated the Unit 1 ponds were little changed from the descriptions provided by the previous surveyors despite the fact that the area had not been managed through controlled burns. 77 Fed. Reg. 35133.

61. Pechmann, who accompanied FWS on the inspection of the property, commented: "The five ponds of interest are open canopy ponds. And I managed [sic] the open canopy on some or all of them a few years ago. . . . they are still open canopy." R2315 at 2408. *Compare* R1090 at 1097 (Pechmann 2006 report, noting that canopy over ponds was open). They are in close proximity to each other, allowing movement of gopher frogs between ponds (no such grouping has been found in Mississippi). The multiple ponds present at this site provide metapopulation structure that supports long-term survival and population resiliency. *See* 77 Fed. Reg. 35135 ("If dusky gopher frogs are translocated to the [Unit 1] site, the five ponds are in close enough proximity to each other that adult frogs could move between them and create a metapopulation").

62. FWS photographs taken at the 2011 inspection show that Sevosa Pond and Small Pond in Unit 1 are still open canopy ponds. R6759-6763 (Sevosa Pond); R6775 and 6776 (Small Pond).

63. FWS concluded that the five breeding ponds in Unit 1 contain the characteristics set forth in PCE 1, 77 Fed. Reg. 35123 (response to comment 15), and provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the gopher frog. 77 Fed.

Reg. 35124 (response to comment 16).

64. In addition to breeding ponds, the frogs "require…upland pine forested habitat that has an open canopy maintained by fire (preferably) for nonbreeding habitat." 77 Fed. Reg. 35132.

65. Although the uplands associated with the ponds do not currently contain the essential physical and biological features of critical habitat, FWS concluded that they are restorable with reasonable effort. 77 Fed. Reg. 35135; *see* R2315 at 2408 (comment from peer reviewer) ("It's much easier to restore a terrestrial habitat for the gopher frog than to restore or build breeding ponds.")

66. Moreover, the uplands in Unit 1 contain underground refugia that would allow for survival of the species, which is a key component of PCE 2. R1567 at 1568; R3098 at 3099-3100 (noting that there are lots of stumps near Sevosa Pond and stumps and root mounds in terrestrial habitat, including a good gopher frog hole near Dry Pond); *see also* R6744, 6745 (photos—Dry Pond burrow).Overall, Unit 1 includes habitat for population expansion outside of the core population areas in Mississippi, a necessary component of recovery efforts for the gopher frog. 77 Fed. Reg. 35135.

67. Accordingly, FWS determined that Unit 1 was essential for the recovery of the gopher frog. 77 Fed. Reg. 35133.

IX. Publication of the revised proposed rule.

68. Having determined that additional critical habitat units must be proposed, FWS recognized that this would require republishing the proposed critical habitat rule. FWS asked the plaintiffs to agree to an extension for the final critical habitat determination. In an agreement entered by the court on May 4, 2011, the deadline for publishing the final critical habitat determination was extended to May 30, 2012. R2449.

69. FWS published a revised proposed rule to designate critical habitat on September 27, 2011. 76 Fed. Reg. 59774.

X. Involvement of the Poitevent Landowners in the rulemaking process

70. A few weeks after Weyerhaeuser informed FWS that it did not own the property around the

five ponds visited by FWS, the agency determined the identity of the actual owners of the property, R5744, and contacted the Poitevent Landowners to discuss that the land was being considered for designation as critical habitat. R5755, 5758. This communication took place in May 2011, approximately four months before FWS issued the revised proposed designation, which included Unit 1 as part of the designation, and thirteen months before the rule was finalized.

71. FWS and the Poitevent Landowners continued to communicate regarding the inclusion of the Unit 1 property throughout the development of the revised proposed rule. R5815, 6085, 6181, 6223.

72. FWS notified the Poitevent Landowners specifically about the issuance of the revised proposed rule, R3566, and the public hearing on the proposed rule. R3689.

73. The Poitevent Landowners provided numerous written comments on the revised proposed rule and economic analysis, all of which were considered by FWS. R1671, 1692, 1818, 1853. They also provided written input for the public hearing, R2209, 2223, as well as spoken remarks. R2370-74, 2410-18.

XI. The economic analysis

74. FWS prepared an economic analysis of the proposed designation of critical habitat for the frog. R6373 (draft economic analysis); R6616 (final economic analysis) (2012_04_06 Email with attachment Ludwig).

75. In preparing the final version of the draft economic analysis, FWS considered the comments of the Landowner Plaintiffs. *See* R6373 (draft economic analysis); 77 Fed. Reg. 35126-28 (responding to comments on economic analysis).

76. The draft economic analysis, as issued, considered three alternative hypothetical scenarios for incremental impacts. R6381-82.

XII. The June 12, 2012 Rule

77. On June 12, 2012, FWS designated 6,477 acres in Mississippi and Louisiana as critical habitat pursuant to the ESA. 77 Fed. Reg. 35118.

78. The Rule designated 5,281 acres of unoccupied habitat, including the 1,544 acres in St.

Tammany Parish described as Unit 1 in the Rule. 77 Fed. Reg. at 35124.

79. In the Rule, FWS identified three primary constituent elements in the Rule, which the agency described as follows:

> (1) Primary Constituent Element 1—Ephemeral wetland habitat. Breeding ponds, geographically isolated from other waterbodies and embedded in forests historically dominated by longleaf pine communities, that are small (generally <0.4 to 4.0 ha (<1 to 10 ac)), ephemeral, and acidic. Specific conditions necessary in breeding ponds to allow for successful reproduction of dusky gopher frogs are:
>
> (a) An open canopy with emergent herbaceous vegetation for egg attachment;
>
> (b) An absence of large, predatory fish that prey on frog larvae;
>
> (c) Water quality such that frogs, their eggs, or larvae are not exposed to pesticides or chemicals and sediment associated with road runoff; and
>
> (d) Surface water that lasts for a minimum of 195 days during the breeding season to allow a sufficient period for larvae to hatch, mature, and metamorphose.
>
> (2) Primary Constituent Element 2—Upland forested nonbreeding habitat. Forests historically dominated by longleaf pine, adjacent to and accessible to and from breeding ponds, that are maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover and gopher tortoise burrows, small mammal burrows, stump holes, or other underground habitat that the dusky gopher frog depends upon for food, shelter, and protection from the elements and predation.
>
> (3) Primary Constituent Element 3—Upland connectivity habitat. Accessible upland habitat between breeding and nonbreeding habitats to allow for dusky gopher frog movements between and among such sites. This habitat is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements, such as that created by deep litter cover, clumps of grass, or burrows.

77 Fed. Reg. 35131.

DATED this 21st day of February, 2014.

Respectfully Submitted,

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UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS

MARKLE INTERESTS, LLC, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICE, et al., Defendants.	CIVIL ACTION CASE NO. 13-234 PERTAINS TO 13-234 SECTION: F(1) JUDGE: MARTIN L.C. FELDMAN MAG. JUDGE: SALLY SHUSHAN **CERTIFICATE OF SERVICE**

I hereby certify that today I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to all counsel of record.

/s/ Mary Hollingsworth
MARY HOLLINGSWORTH