No. 14-31008

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARKLE INTERESTS, L.L.C.; P&F LUMBER COMPANY 2000, L.L.C.; PF MONROE PROPERTIES, L.L.C.,

Plaintiffs-Appellants,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL M. ASHE, Director of United States Fish & Wildlife Service, in his official capacity; UNITED STATES DEPARTMENT OF INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the Department of Interior,,

Defendants-Appellees,

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants - Appellees.

Consolidated with No. 14-31021

WEYERHAEUSER COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL M. ASHE, Director of United States Fish & Wildlife Service, in his official capacity; UNITED STATES DEPARTMENT OF INTERIOR; KENNETH SALAZAR, Secretary of the Department of the Interior, in his official capacity; SALLY JEWELL, in her official capacity as Secretary Of The Department Of Interior,

Defendants-Appellees,

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenors Defendants - Appellees.

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On appeal from the United States District Court, Eastern District Of Louisiana, Nos. 2:13-CV-234, 2:13-CV-362, 2:13-CV-413, 2:13-CV-234, Section "F," Honorable Martin L.C. Feldman, Presiding

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RESPONSE BRIEF FOR THE APPELLEES

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STATEMENT REGARDING ORAL ARGUMENT

Appellees believe that oral argument would be helpful to the Court, as some of the issues are ones of first impression in this Court. We accordingly request oral argument.

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STATEMENT OF JURISDICTION

Appellees agree with the statement of jurisdiction found in the Opening Brief of Appellants ("Br.") at 1.

STATEMENT OF THE ISSUES

Under the Endangered Species Act ("ESA"), the United States Fish & Wildlife Service ("FWS") is required, to the maximum extent prudent and determinable, to designate critical habitat for a species when it lists a species as endangered or threatened. 16 U.S.C. § 1533(a)(3)(A). Critical habitat is defined in the Act to include both occupied habitat and "specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination by [FWS] that such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). FWS here determined that a 1,544-acre parcel in St. Tammany Parish, Louisiana, which supported dusky gopher frogs as recently as 1965, is essential for the conservation of this frog, a highly endangered species whose surviving members (around 100 adults in the wild) are currently found only in a few ponds in Mississippi. FWS found that this parcel, called Unit 1, contains a unique group of five breeding ponds that "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." 77 Fed. Reg. 35,124 (2012), ROA.635. FWS

determined that Unit 1 is essential to the conservation of this species because it provides important breeding sites for recovery, includes habitat for population expansion outside of the core population areas in Mississippi, and protects against the possibility that a single random event might extirpate the remaining frogs in Mississippi. The questions raised in this challenge by the owners of Unit 1 are:

1. Was FWS authorized by the ESA to designate Unit 1 as critical habitat after finding that it was essential to the conservation of the species, where the landowners oppose efforts to re-establish a population of dusky gopher frogs there?
2. Was it arbitrary or capricious for FWS to find that Unit 1 was essential to the dusky gopher frog because it would provide a uniquely suitable breeding site for recovery of this highly imperiled species as well as habitat for population expansion outside of the small areas in Mississippi now occupied by the species?
3. Did FWS comply with its obligation to "tak[e] into consideration the economic impact" of the designation, 16 U.S.C. § 1533(b)(2), where FWS conducted an extensive Economic Analysis but declined to exercise its discretion to exclude Unit 1 based on economic impacts?

4. Did Congress exceed its powers under the Commerce Clause by authorizing the designation of unoccupied critical habitat such as Unit 1 that is determined by FWS to be essential for the conservation of a species?
5. Does the National Environmental Policy Act ("NEPA") require preparation of an environmental assessment or environmental impact statement when FWS designates critical habitat under the ESA?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

A. Statutory and regulatory background

1. The Endangered Species Act

The ESA, 16 U.S.C. §§ 1531 *et seq*., provides "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). The ESA carries out its purposes, in part, by directing the Secretary of the Interior (who

administers the ESA through FWS)[1] to identify certain species and their critical habitats for federal protection.

ESA § 4(a) instructs FWS to "determine," according to certain specified factors, "whether any species is an endangered species or a threatened species." 16 U.S.C. § 1533(a)(1). An "endangered species" is "any species [except for certain insect pests] which is in danger of extinction throughout all or a significant portion of its range;" a "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(6), (20). FWS must publish a list of all endangered and threatened species in the Federal Register. 16 U.S.C. § 1533(c)(1).

The ESA requires FWS to designate critical habitat for listed species by regulation published in the Federal Register after notice and comment. 16 U.S.C. § 1533(a)(3)(A). The final regulation must be published concurrently with the final rule listing the relevant species as threatened or endangered "to the maximum extent prudent and determinable." *Id*.

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[1] Responsibility for administering the ESA is divided between the Secretaries of Interior and Commerce. 16 U.S.C. §§ 1532(15), 1533(a)(2). Interior has responsibility for terrestrial species like the dusky gopher frog.

The ESA defines "critical habitat" as including both occupied and unoccupied habitat. FWS may designate "the specific areas within the geographical area occupied by the species, at the time [it is listed as an endangered or a threatened species], 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." 16 U.S.C. § 1532(5)(A)(i). It can also designate areas outside the geographical area occupied by the species at the time it is listed "upon a determination by the Secretary that such areas are essential for the conservation of the species." *Id*. § 1532(5)(A)(ii). FWS regulations provide that habitat unoccupied by the species at the time of listing shall be designated 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).

Under ESA § 4(b), FWS must designate critical habitat "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 a critical habitat." 16 U.S.C. § 1533(b)(2). FWS "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such areas as part of the critical habitat," unless exclusion will

result in the extinction of the species. *Id.* In "taking into consideration" such 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), *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 [FWS's] discretion." *Id.* FWS's implementing regulations confirm that the decision whether to exclude any area from critical habitat is always discretionary, even where the benefits of excluding a particular area outweigh the benefits of including it. 78 Fed. Reg. 53,058, 53,063 (2013) (revising 50 C.F.R. § 424.19).

The sole legal consequence under the ESA of designating an area as critical habitat is that it becomes subject to consultation under ESA § 7, 16 U.S.C. § 1536. That provision requires federal agencies to consult with FWS to ensure that any action they authorize, fund, or carry out, among other things, "is not likely to * * * result in the destruction or adverse modification of habitat of such species which is determined by [FWS] * * * to be critical." 16 U.S.C. § 1536(a)(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. 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. *See Fisher v. Salazar*, 656 F. Supp. 2d 1357, 1359 (N.D. Fla. 2009).

2. National Environmental Policy Act

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). Agency actions that do not alter the physical environment do not require an EIS. *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 679 (5th Cir. 1992).

B. Factual Background

1. The frog is listed as endangered.

The dusky gopher frog (*Rana sevosa)* was listed by FWS as endangered in 2001 based on several factors, namely 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 these other threats. 66 Fed. Reg. 62,993, 62,997-62,300 (2001).[2] 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. 62,994. However, no dusky gopher frogs have been observed in Louisiana since 1965 or in Alabama since 1922. *Id*. The last known location in Louisiana is also the last known breeding pond for the species in Louisiana, a pond located in Unit 1. 76 Fed. Reg. 59,774, 59,781, 59,783 (2011).

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. 62,997; 75 Fed. Reg. 31,396, 77 Fed. Reg. 35,133, ROA.644. Between the time the species was listed and critical habitat was proposed, two more naturally occurring populations were discovered, and one additional population was established through translocation, in Jackson County, Mississippi. 75 Fed. Reg. 31,389, 31,397. The current range of the frog consists of one site in Harrison County, Mississippi (Glen's Pond) and three in Jackson County (Mike's Pond,

[2] At the time of listing the frog was known as the "Mississippi gopher frog."

McCoy's Pond, and a Nature Conservancy pond on private land). 77 Fed. Reg. 35,133, ROA.644. Of the four occupied sites, Glen's Pond is the only one where measurable numbers of adult gopher frogs have been documented, ranging from 50 to 100 since the frog was listed. Administrative Record ("AR") 963, AR.1125, AR.1364. 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. AR.2454; AR.2456-68. The location of additional habitat has been a priority for FWS since the species was listed. 75 Fed. Reg. 31,389.

2. The proposed critical habitat rule.

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 of critical habitat due to budget limitations. 66 Fed. Reg. 63,000. In 2007, the Center for Biological Diversity brought a lawsuit challenging FWS's failure to timely designate critical habitat. AR.2421. The suit resulted in a court-approved agreement in which FWS agreed to certain deadlines for designation of critical habitat. AR.2435.

Pursuant to that agreement, FWS published a proposed critical habitat rule on June 3, 2010. 75 Fed. Reg. 31,387. FWS identified the

frog's three essential habitat features, or "Primary Constituent Elements" ("PCEs"): 1) ephemeral wetland habitat for breeding; 2) upland forested nonbreeding habitat that provides food and shelter; and 3) upland connectivity habitat. 75 Fed. Reg. at 31,404; *see also* 77 Fed. Reg. at 35,121, ROA.632.

FWS proposed to designate the 96 acres occupied at the time of listing and 1861 acres unoccupied at the time of listing. 75 Fed. Reg. 31,395. As noted, by the time of the proposed designation, frogs had been found on four sites in Mississippi, only one of which had measurable numbers of adult frogs. FWS found that the occupied habitat of the frog was highly localized and fragmented. 75 Fed. Reg. 31,394. With such limited distribution, the frog is at high risk of extinction and highly susceptible to stochastic events. *Id.* Pond-breeding amphibians are particularly susceptible to drought, and isolated populations are highly susceptible to random events. 75 Fed. Reg. 31,395. 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. 31,394.

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. 31,389. The proposed critical habitat rule included, in addition to the four currently occupied units, seven units that were unoccupied but were determined to be essential to the conservation of the frog, all in Mississippi. 75 Fed. Reg. 31,395-99.

3. The peer review process and the revised proposed critical habitat rule.

In accordance with FWS policy, *see* 59 Fed. Reg. 34,270 (1994), the agency sought the expert opinions of seven knowledgeable and independent specialists regarding the proposed rule. The purpose of the peer review was to ensure that a proposed action is based on scientifically sound data, assumptions, and analyses. 77 Fed. Reg. 35,119, ROA.630. 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. 35,125, ROA.636.

The peer reviewers agreed that FWS needed to go beyond the proposed critical habitat units in Mississippi and investigate sites in Louisiana and Alabama as well. AR.1537-38; AR.1539 at 1541; AR.1567 at 1568; AR.1656 at 1658. As one of the peer reviewers, Dr. Joseph Pechmann, explained:

> [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. * * * 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.

AR.1568 (internal citations omitted); *see also* AR.1582 (peer reviewer Richter states that 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."); AR.1585 (peer reviewer Blihovde comments to same effect).

Based on the comments of the peer reviewers and others, FWS determined that recovery of the frog will not be possible without the establishment of additional breeding populations of the species beyond the habitat it had originally proposed. Because 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, FWS focused on identifying more of these ponds throughout the species' range. 77 Fed. Reg. 35,124, ROA.635. FWS considered a site in Alabama where the frog had been documented in the 1920s, but found that the upland terrestrial habitat at this location has been replaced by residential development and that the only ponds identified did not contain habitat that would provide a conservation benefit for the frog. Accordingly, FWS did not designate that site. *Id.*

As to possible sites in Louisiana, Dr. Pechmann had drawn attention to the pond where the frog was documented in the 1960s, noting that, based on his site visits, this pond "retains the required characteristics necessary to serve as a breeding pond" and that "[a]nother pond located nearby also retains these characteristics." AR.1568. Pechmann noted that although "the terrestrial habitat surrounding these ponds is currently in commercial pine plantations, it retains some stump holes and could be restored to suitable upland habitat for *R. sevosa* * * *." *Id.* He 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." AR.2315 at 2408 (comments at public hearing).

FWS inspected the site and found that the five ephemeral ponds were intact and of remarkable quality, and similar to ponds in Mississippi used for breeding by frogs. 77 Fed. Reg. 35,133, ROA.644. FWS concluded 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 of the gopher frog. 77 Fed. Reg. 35,124, ROA.635. 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. 35,135, ROA.646; *see* AR.2315 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.") 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. 35,135, ROA.646. Accordingly, FWS determined that Unit 1 was essential for the recovery of the gopher frog. 77 Fed. Reg. 35,133, ROA.644.

4. The economic analysis.

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 35,140, ROA.651. 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 information provided by the landowners, using the following three hypothetical scenarios: (1) development occurring in Unit 1 avoids impacts to wetlands subject to the Clean Water Act, and thus does not trigger ESA Section 7 consultation requirements;[3] (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. AR.6625-26.

5. The final rule.

The June 2012 final Rule was the culmination of this series of proposed rules, economic analyses, three rounds of notice and comment, and a public hearing. 77 Fed. Reg. 35,118-19, ROA.629-30. The Rule

[3] Similarly, if Unit 1 continues to be used for timber harvesting there would be no federal nexus and thus no economic impacts. AR.2216; 2220; *see also* AR.6662-63 (FEA 4-2 - 4-3). The likelihood of this scenario is enhanced by the fact that Weyerhaeuser holds a lease to continue such operations until 2043. AR.2216.

designated a total of 6,477 acres in Mississippi and Louisiana, all within the historic range of the frog, including the 1,544 acres in Unit 1 which FWS found "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." 77 Fed. Reg. 35,124, ROA.635. FWS thoroughly explained why it concluded that designation of Unit 1 was essential for the conservation of the frog. *See* 77 Fed. Reg. at 35,135; 35,121, ROA.646, 632. After considering the economic impacts of the designation, FWS determined that no disproportionate costs were likely to result from the designation and did not exercise its discretion to exclude Unit 1. 77 Fed. Reg. at 35,141, ROA.652.

C. The District Court decision.

The disposition of the district court is accurately described in the brief of Intervenors Center for Biological Diversity, et al., at 6-8.

SUMMARY OF ARGUMENT

The ESA provides that FWS "shall designate" specific areas unoccupied by an endangered species as critical habitat if it determines that "such areas are essential for the conservation of the species." 16 U.S.C. §§ 1532(5)(A)(ii), 1533(b)(2). FWS concluded that Unit 1 is essential for the conservation of the dusky gopher frog after finding that recovery of this

species "will not be possible without the establishment of additional breeding populations of the species." 77 Fed. Reg. at 35,124, ROA.635. After visiting the five ephemeral ponds on Unit 1, FWS concluded that "[t]hese ponds were intact and of remarkable quality," and that they "are in close proximity to each other, which would allow movement of adult gopher frogs between them," permitting establishment of a metapopulation that could protect against catastrophic loss at any one site. 77 Fed. Reg. at 35,133, ROA.644. Also, the ponds are far enough away from existing occupied habitat in Mississippi that establishment of a population there could lessen the risk that a random catastrophe could lead to extinction.

The district court properly rejected landowners' argument that FWS exceeded its authority under the ESA by designating an area that would require some upland habitat restoration and translocation of frogs in order to assist in the frog's recovery. The statute does not limit FWS's ability to designate unoccupied habitat simply because the degree to which that habitat may benefit the species' recovery is uncertain. FWS may designate unoccupied habitat based on its potential to support recovery, as it did with the "remarkable" breeding habitat found on Unit 1. The statute does not preclude designation simply because the current owners object to recovery efforts.

Congress left it to FWS to determine whether the probability that particular unoccupied habitat would benefit recovery of a species is sufficient to warrant designation. Here, FWS found that the uniquely valuable ephemeral pond habitat found on Unit 1 is essential to the conservation of the frog, and that in light of the various measures that are available for obtaining voluntary cooperation of landowners for recovery efforts, it was reasonable to designate Unit 1 as critical habitat notwithstanding the landowners' current position against aiding recovery. Landowners have failed to meet the high burden of showing that FWS's findings, which rested on its scientific expertise, were arbitrary or capricious.

The ESA requires that a critical habitat designation be made "after taking into consideration the economic impact" of the designation. 16 U.S.C. § 1533(b)(2). FWS complied with this obligation by considering a thorough Economic Analysis. Contrary to landowners' contentions, there is no requirement in the statute that FWS quantify the benefits of the proposed designation and expressly weigh them against economic costs.

While the statute provides that that the Secretary "may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical

habitat," 16 U.S.C. § 1533(b)(2), it provides no standards constraining FWS's exercise of its discretionary authority to *not* exclude areas. Hence, a decision by FWS not to exclude areas due to economic impact is unreviewable, as courts that have considered this issue have found. Even if such determinations are reviewable, the record here plainly shows that FWS's determination not to exclude Unit 1 was based on appropriate factors and was not arbitrary or capricious.

The district court correctly found that the landowners' challenge to Congress' authority to authorize the designation of unoccupied habitat like Unit 1 as critical habitat is "foreclosed by binding precedent." ROA.2015. In *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), this Court rejected a nearly identical constitutional challenge to the regulation of habitat on private lands for the benefit of endangered species for which there was no commercial market. 326 F.3d at 625. The reasoning of *GDF Realty* precludes any argument that Congress lacks the power to direct FWS to designate unoccupied habitat that it has determined is essential for conservation of a species. 16 U.S.C. §1532(5)(A)(ii) is one of several interrelated provisions of the ESA that attempt to halt the decline and promote the recovery of endangered species through preserving habitat. Such designation is a critical aspect of a regulatory scheme aimed

at recovering currently endangered species and thereby preserving "the 'incalculable' value of the genetic heritage that might be lost absent regulation." *GDF Realty*, 326 F.3d at 639. It is clearly within Congress' power under the Commerce Clause.

Landowners' NEPA claims suffer from two defects. First, the landowners have not shown that they are "adversely affected or aggrieved by agency action within the meaning of a relevant statute," and hence they cannot bring a NEPA claim under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. The landowners' asserted interests are solely economic, and the cases consistently rule that economic interests are not within the zone of interests of NEPA, and hence do not permit a NEPA claim to be brought under the APA. Second, even if landowners could maintain a NEPA action, the requirements of that statute are only triggered by federal agency proposals that have some physical effect on the environment. *See Sabine River Auth. V. U.S. Dept. of* Interior, 951 F.2d 669, 679 (5th Cir. 1992). The designation of critical habitat has no such effect, and does not implicate NEPA procedures.

STANDARD OF REVIEW

Review of the district court's grant of summary judgment is *de novo*. *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 627 (5th Cir. 2001).

Review of FWS's designation of critical habitat under the ESA proceeds under the arbitrary and capricious standard of the APA, 5 U.S.C. § 706. *Bennett v. Spear*, 520 U.S. 154, 174-75 (1997). An agency action is arbitrary and capricious only, "'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Tex. Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 933 (5th Cir. 1998) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Tex. Oil & Gas Ass'n*, 161 F.3d at 934. The agency's decision is entitled to a presumption of regularity that "places a 'considerable burden' on the challenger to overcome the [agency's] chosen course of action,'" and that "is particularly true where * * * the agency's decision rests on an evaluation of complex scientific data within the agency's technical expertise." *Id.*, (quoting *American Petroleum Inst. v. E.P.A.*, 787 F.2d 965, 983 (5th Cir. 1986)).

ARGUMENT

I. FWS did not exceed its authority by designating the unoccupied habitat in Unit 1.

There is no basis in the text of the ESA or its implementing regulations for the landowners' argument (Br. 30) that the FWS "exceeded its authority" under the ESA by designating Unit 1 as critical habitat despite uncertainty over whether the area designated will ultimately benefit the species. The limits on FWS's authority to designate unoccupied habitat are clearly expressed. The ESA provides that FWS may designate unoccupied areas as critical habitat upon determining "that such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The implementing regulations further provide that unoccupied areas may be designated "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).[4] Neither of these express limitations constrains the designation

[4] FWS and the National Marine Fisheries Service ("NMFS") have proposed amendments to their regulations for designation of critical habitat found at 50 C.F.R. Part 424. *See* 79 Fed. Reg. 27,066 (May 12, 2014). Among other possible changes, the proposed revised regulations would replace 50 C.F.R. § 424.12(e) and the language cited in the text above, and substitute a new provision that does not contain that language, 50 C.F.R. § 424.12(b)(2). *See* 79 Fed. Reg. at 27,073 & 27,077. The proposal makes clear that any revisions to the regulations, if finalized, would be prospective only and

Cont.

of unoccupied critical habitat simply because obstacles to use of the habitat by the species, such as landowner opposition to relocation efforts, are present.

The very fact that Congress authorized the designation of "specific areas outside the geographical area occupied by the species at the time it is listed" 16 U.S.C. § 1532(5)(A)(ii), shows that Congress recognized the importance of designating unoccupied critical habitat based on its potential to serve the needs of a recovering population. Whether unoccupied habitat will actually aid in the conservation of the species will *always* be contingent on factors such as whether the species can overcome obstacles to its expansion, and whether the area will still be useable if and when such expansion occurs, either by natural migration or human-assisted translocation.

While landowners contend (Br. 33) that FWS's finding that Unit 1 is "essential" for the conservation of this species is contrary to the "plain meaning" of that term, they offer no definition of "essential" that supports their claim, other than the unhelpful tautology that "'essential' must truly mean essential, not whatever the Service wants it to mean." Br. 34.

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would not "require * * * that any previously completed critical habitat designation must be reevaluated." 79 Fed Reg. at 27,066.

Common dictionary definitions for "essential" include "of the utmost importance" or "necessary,"[5] but in no case is "essential" defined in a way that connotes a degree of certainty that the thing that is necessary or important will be obtained.

The Ninth Circuit has rejected a similar effort to limit FWS's ability to designate critical habitat by imposing an alleged statutory criterion based on the probability of success of recovery efforts. In *Home Builders Ass'n of N. Cal. v. U.S. Fish and Wildlife Serv.*, 616 F.3d 983 (9th Cir. 2010), the plaintiffs argued that "[i]f FWS does not know when the species in question will be brought to this point [recovery] * * * it cannot know what physical or biological features are required to bring the species there." *Id.* at 989. The Court rejected the argument, stating:

> Home Builders does not explain why it is impossible to determine the elements essential to a goal without determining when the goal will be achieved. A seller of sporting goods should be able to identify which rod and reel are essential to catching a largemouth bass, but is not expected to predict when the customer will catch one.

Id. at 989. In the same way here, FWS can identify areas of unoccupied habitat that are essential to the conservation of the species without making

[5] *See Websters Ninth New Collegiate Dictionary* (1985).

a prediction as to the likelihood of the species successfully expanding to those areas.

While the statute does not define "essential," it does broadly define "conservation" to mean "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3). This expansive language confirms that the Service may use methods and procedures whose ultimate success may be uncertain.

Landowners also rely (Br. 38) on ESA Section 4(a)(3)(A)(ii)'s directive to FWS to designate, at the time of a species' listing, any habitat of such species "'which is *then* considered to be critical habitat'" (quoting 16 U.S.C. § 1533(a)(3)(A)(i), emphasis in Brief), contending that this somehow precluded FWS from designating what landowners call "potential habitat." The word "then" in Section 4(a)(3)(A)(i) simply refers to the time at which the critical habitat determination is made. Unit 1 met the statutory definition of unoccupied critical habitat at the time it was designated. Indeed, Unit 1 contained some of the best breeding habitat then in existence. It was "then considered to be critical habitat," and properly so.

If Congress had wanted to limit the Service to designating only unoccupied areas that had a strong likelihood of bringing about species conservation in a particular time frame it could easily have included appropriate limiting language, but it did not. Courts "ordinarily resist reading words or elements into a statute that do not appear on its face," *Dean v. United States*, 556 U.S. 568, 572 (2009), and there is nothing on the face of the ESA that imposes a limitation on the designation of unoccupied habitat based upon likelihood of eventual occupation. The fact that Congress did not provide a definition for "essential" indicates that Congress left it to the Service to determine the bounds of that concept on a case-by-case basis. *See Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001) (where ESA requires Secretary to designate critical habitat "to the maximum extent prudent or determinable," but does not define those terms, "[t]he ESA leaves to the Secretary the task of defining 'prudent' and 'determinable,'" so long as the Secretary makes designation decisions on the basis of the best scientific data available and after taking into consideration economic impacts).

Landowners' contention that Congress precluded designation of an area such as Unit 1 that contains the best remaining breeding habitat for a highly imperiled species is not only unsupported by the statutory language,

but also profoundly at odds with the overall purpose of the ESA to reverse the trend toward extinction of species. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), the Supreme Court considered and rejected a similar effort to place limits on an ESA provision that protected habitat for listed species by prohibiting the "take" of such species, 16 U.S.C. § 1538(a)(1), which the Service had defined to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. The Supreme Court rejected contentions that the statute "limited the purview of 'harm' to direct applications of force against protected species," noting, *inter alia*, that this limitation would defeat one of the "central purposes" of the statute to preserve ecosystems upon which listed species depend. 515 U.S. at 697-98; *see also id.* at 699 (recognizing that the policy of halting and reversing the trend toward species extinction is "'reflected not only in the stated policies of the Act, but in literally every section of the statute,'" quoting from *TVA v. Hill*, 437 U.S. 153, 184 (1978)). Landowners' attempt to bar FWS from designating unoccupied habitat that has been found to be essential, simply because the current owners are opposed to re-introduction

of the species, is contrary to the central policy of the ESA to preserve important ecosystems in order to prevent extinctions.

Landowners' argument finds no support in the legislative history of the 1978 amendments. Nothing in that legislative history addresses the question whether there must be a certain degree of likelihood that particular unoccupied habitat will in fact contribute to the conservation of a listed species. While the House report cited by landowners expressed a concern that FWS's then existing regulations "could conceivably lead to the designation of virtually all of the habitat of the listed species as its critical habitat,"[6] that concern had nothing to do with the issue of the Service's ability to designate essential habitat where there are certain obstacles to use of that habitat, such as landowner opposition. Congress dealt with the concern about designating all of a species' habitat simply by including the provision now found at 16 U.S.C. § 1532(5)(C), which states that "[e]xcept in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." The legislative history does not show any concern with the issue raised by landowners here.

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[6] H.R. Rep. No. 95-1625, 95th Cong., 2d Sess. 25, reprinted in 1978 U.S. Code Cong. & Admin. News 9453, 9475.

In short, there is no support for landowners' theory that the ESA imposes limits on the Service's ability to designate unoccupied habitat essential for conservation of the species based on the possibility that obstacles to use of that habitat such as landowner opposition cannot be overcome. Congress left it to the Service to determine whether the probability that essential unoccupied habitat would be beneficial is sufficient to warrant designation. Here, the Service found that the uniquely valuable ephemeral ponds found on Unit 1 constituted habitat that is essential to the conservation of the frog, and given that various legal measures exist for obtaining voluntary cooperation of landowners in this situation, it was reasonable to designate Unit 1 as critical habitat. The statute did not constrain the Service from reaching this conclusion, and as we show in the next section, this determination was in no way arbitrary or capricious.

II. FWS's determination that Unit 1 is essential for the conservation of the dusky gopher frog was not arbitrary or capricious.

Landowners assert that the designation of Unit 1 was arbitrary and capricious because it allegedly lacks a "logical connection to the conservation of the species," since in their view the benefit of this area to the species is "speculative" in light of their opposition to translocation of frogs. Br. 28. As demonstrated in the previous section of this brief,

Congress did not limit FWS' ability to designate unoccupied habitat determined to be essential simply because obstacles exist at the time of designation that could prevent future use of the habitat by a recovering species. Accordingly FWS's designation of critical habitat in Unit 1, based on its unique potential to serve as a breeding area and a possible refuge in case of random catastrophic events affecting the other designated areas, must be upheld under the APA unless FWS "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). It did not.

As the district court found (Order at 30-31, ROA.2021-22), FWS considered the relevant factors, including the fact that the peer reviewers found that the original proposal to designate only areas in Mississippi was inadequate to conserve the species.[7] FWS came to the scientific

[7] As FWS explained in the final designation, "[t]he scientific peer reviewers that responded to our original proposed critical habitat rule were united in their assessment that this proposal was inadequate for the conservation of the dusky gopher frog and that we should look within the species' historic

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conclusion, not disputed by landowners, that recovery of the frog "will not be possible without the establishment of additional breeding populations of the species," and that "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 35,124, ROA.635. FWS visited the five ephemeral ponds on Unit 1, and noted in the final rule that "[t]hese ponds were intact and of remarkable quality." *Id.* at 35,133, ROA.644. Moreover, "the ponds are in close proximity to each other, which would

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range outside the state of Mississippi for additional habitat for the designation." 77 Fed. Reg. 35,123-24, ROA.634-35. Landowners do not contest FWS's conclusions regarding inadequacy, but amici American Farm Bureau Fed'n, et al., do, claiming (Br. 10) that 50 C.F.R. § 424.12(e) requires an express finding and that "USFWS failed to make the requisite finding that a designation limited to occupied habitat would be inadequate." To begin with, "[i]t is well-settled in this circuit that 'an amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal.'" *World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 753 (5th Cir. 2009), quoting *Resident Council of Allen Parkway Vill. v. U.S. Dep't of Hous. & Urban Dev.*, 980 F.2d 1043, 1049 (5th Cir. 1993). In any event, there is no language in 50 C.F.R. § 424.12(e) imposing a requirement for an express finding. *Compare* 16 U.S.C. § 1532(5)(A)(ii) (requiring "a determination by the Secretary" that unoccupied areas are essential for the conservation of the species). But even if there were such a requirement, FWS complied by finding that a designation limited to occupied habitat would be inadequate. 77 Fed. Reg. 35,123, ROA.634 ("The only pond occupied at the time of listing is being designated and we determined that this one location is not sufficient to conserve the species. Additional areas that were not known to be occupied at the time of listing are essential for the conservation of the species."); *see also id.* at 35,121 (same).

allow movement of adult gopher frogs between them." FWS pointed out that:

> 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 dusky gopher frogs due to their limited population numbers. The multiple ponds present at the St. Tammany Parish site provide metapopulation structure that supports long-term survival and population resiliency. As a result, the Service determined that this area of St. Tammany Parish (Unit 1) is essential for the conservation of the dusky gopher frog.

Id. at 35,133, ROA.644.

The ponds on Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range." *Id*. at 35,124, ROA.635. Unit 1 was thus found to be essential for the conservation of the frog because it provides breeding habitat "where the rarity of that habitat is a primary threat to the species;" provides more than just an isolated pond but "a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the [frog];" and provides "geographic distance from extant [frog] populations, which likely provides protection from environmental stochasticity." *Id*.

There is no basis for the landowner's repeated charge (Br. 2, 6, 13, 20, 28, 30, 35, 39, 53) that Unit 1 is "unsuitable" as habitat for the frog because the upland areas around these unique ponds currently lacks certain

beneficial characteristics, such as an open canopy and grassy areas. In the first place, neither the ESA nor the regulations uses the terms "suitable" or "unsuitable" to refer to critical habitat. Landowners cite (Br. 11) a statement by FWS that closed-canopy pine plantations are generally "unsuitable as habitat for dusky gopher frogs and other species of gopher frogs." 77 Fed. Reg. 35,129, ROA.640. This general statement about pine plantations does not suggest that Unit 1, with its uniquely favorable group of breeding ponds, cannot be determined to be essential habitat for the frog. As the district court found (Order 32-33, ROA.2023-24), the statute and regulations do not require that all or even any primary constituent elements needed by a species be present on each unoccupied area that the Service has determined is essential for the conservation of the species, and landowners do not challenge that holding in this appeal. *See also 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).

FWS recognized that the forested uplands surrounding the five ponds on Unit 1 would need to be restored to a more natural condition of open-canopied forest, rather than a closed-canopy tree farm, in order to better support functions other than breeding. FWS found that this could be accomplished "with reasonable effort" using existing statutory tools such as

habitat conservation plans to obtain landowner cooperation. 77 Fed. Reg. 35,135, 35,123, ROA.646, 634. FWS pointed out that it had already used some of these tools to restore habitat for the frog on several sites in Mississippi, including on private land. *Id.* at 35,133, ROA.644 (noting success in habitat restoration for the frog on private land through cooperation with the Nature Conservancy and through use of a wetland mitigation bank).

The fact that two of the ponds on Unit 1 are known to have been utilized by the frog for breeding in the past, 77 Fed. Reg. at 35,124, confirms the reasonableness of the Service's assumption that the upland areas around the ponds can again serve as habitat, as they did in the past. In light of the lack of other comparable habitat with the unique features found on Unit 1, it was plainly reasonable for FWS to designate Unit 1 as critical habitat notwithstanding that upland areas around the ponds would need some restoration to fully support frog populations.[8]

Landowners' claim (Br. 40) that FWS's reasoning would "allow it to burden vast swathes of private lands across the United States" is

[8] Landowners do not challenge the district court's ruling that FWS appropriately established boundaries for Unit 1 based upon the need for corridors between breeding sites to maintain connectivity and gene flow. Order. at 36, n.29, ROA.2027.

unsupported by any evidence that FWS has interpreted its authority to permit such broad designation. The requirement that FWS can only designate such habitat upon determining "that such areas are essential for the conservation of the species," 16 U.S.C. § 1532(5)(A)(ii), precludes the regulatory overreach that landowners hypothesize. Landowners also overlook how carefully limited the decision was in this case. FWS's inclusion of upland forested areas in Unit 1 was based on the fact that they happen to surround a rare and highly valuable group of ponds, and could be restored to an open-canopied forest habitat with reasonable effort. At the same time, FWS did not designate sites in Alabama where the frog had lived in the past, because those ponds were not of high quality and surrounding upland areas had been replaced by residential development. 77 Fed. Reg. 35,124, ROA.635.

Landowners fail to meet the high burden of showing that FWS's findings, which rested on its scientific expertise, were arbitrary or capricious. *See Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). Indeed, other than their own self-serving comments, landowners point to no document in the record that

contradicts the expert agency's finding that Unit 1 is essential to conservation of the frog. The Court should decline landowners' request that it disagree with FWS's thorough scientific analysis and reasoned conclusion that Unit 1 is essential, based simply on the fact that the landowners have chosen not to participate in efforts to restore the frog.

III. FWS' consideration of economic impacts satisfied all applicable requirements.

Landowners next contend (Br. 41) that FWS "arbitrarily chose not to exclude Unit 1" from the designation despite allegedly significant economic impacts on landowners from the designation. While economic impacts are relevant to the designation of critical habitat, the only requirement imposed by the ESA is that the designation be made "after taking into consideration the economic impact" of the designation. 16 U.S.C. § 1533(b)(2). While the statute also provides that that the Secretary "may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," *id.*, it provides no standards constraining FWS's exercise of this discretionary authority, and hence a decision by FWS not to exclude areas due to economic impact is entirely discretionary and hence unreviewable. Finally, even if such determinations are reviewable, the record here plainly shows

that FWS's determination not to exclude Unit 1 was based on appropriate factors and was not arbitrary or capricious.

A. FWS fulfilled the requirement to consider economic impacts.

ESA Section 4(b)(2) provides:

> The Secretary shall designate critical habitat * * * 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 * * *. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines * * * that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2).

The first sentence sets forth the only mandatory requirement applicable to critical habitat designations generally: FWS "shall" designate on the basis of the best scientific data available and after "taking into consideration" economic and other impacts. Landowners do not contend that FWS failed to take economic impacts into consideration, and could hardly do so given the extensive attention that FWS gave such impacts in the Economic Analysis (AR.6617-6707).

Landowners suggest (Br. 44) that FWS should have considered economic impacts in a particular way, by engaging in a specific weighing of economic impacts against the benefits to the species of designation of Unit

1. But the highly general directive to take economic impacts "into consideration" does not suggest that Congress demanded a particular type of analysis, such as an express quantification and weighing of costs and benefits.

The legislative history confirms that Section 4(b)(2) simply requires FWS to consider economic impacts but does not otherwise constrain its discretion. The relevant language of Section 4(b)(2) first appeared in the House version of proposed amendments to the ESA. *See* H.R. 14104, 95th Cong. § 2 (1978). The House Committee on Merchant Marine and Fisheries explained:

> Economics and any other relevant impact shall be considered by the Secretary in setting the limits of critical habitat for such a species. The Secretary is not required to give economics or any other 'relevant impact' predominant consideration in his specification of critical habitat * * *. The consideration and weight given to any particular impact is completely within the Secretary's discretion.

H.R. Rep. No. 95-1625, at 17, reprinted in 1978 U.S.C.C.A.N. 9453, 9467 (1978); *see also* 78 Fed. Reg. 53,058 (2013) (preamble to revisions to FWS/NMFS regulations for impact analysis of critical habitat find that "'[t]he consideration and weight given to any particular impact is completely within the Secretary's discretion'") (quoting from H.R. Rep. No. 95-1625 at 17).

In light of the statutory language and legislative history, courts have consistently found that Section 4(b)(2) does not direct how the consideration of economic impacts is to be done. *See Fisher v. Salazar*, 656 F. Supp. 2d 1357, 1368 (N.D. Fla. 2009) ("Neither the statute nor the regulations prescribe any particular method for determining the economic impact of a designation"); *Alaska Oil & Gas Ass'n v. Salazar*, 916 F. Supp. 2d 974, 994 (D. Ak. 2013), ("[t]he Service merely needs to show that it considered all of the impacts of the potential designation prior to creating it," and "is not required to show in the record that it carried out a benefits-balancing exercise for each and every potential impact to the areas to be designated"); *Bldg. Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, 2012 WL 6002511 at *5 (N.D. Cal. 2012) (same), *appeal pending*, No. 13-15132 (9th Cir.).

The thorough consideration of economic impacts in the Economic Analysis fulfilled FWS's obligation to "tak[e] into consideration the economic impact" of the designation.

B. Decisions not to exclude areas from critical habitat designations are not reviewable.

While critical habitat designations under Section 4(b)(2) are reviewable, decisions not to use FWS's discretionary authority to exclude areas from designation under the second sentence of Section 4(b)(2) are

not reviewable because they are "committed to agency discretion by law." *See* 5 U.S.C. § 701(a)(2).[9] An agency action is committed to agency discretion by law where a "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion" and where "no judicially manageable standards are available for judging how and when an agency should exercise its discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

The second sentence of Section 4(b)(2) provides a judicially manageable standard to judge the agency's decision *to exclude* areas from critical habitat designation. Specifically, if the agency chooses to exclude, it must do so on the basis that the benefits of exclusion outweigh the benefits of designation, and its decision must not be likely to lead to the extinction of a species. 16 U.S.C. § 1533(b)(2). In contrast, there is no judicially manageable standard by which to judge FWS's decision *not* to exclude areas from a designation. Accordingly, non-exclusion decisions are committed to agency discretion by law.

[9] The district court upheld FWS's decision not to exclude Unit 1 without reaching the argument raised in FWS's summary judgment briefing (ROA.1222-24) that the decision was unreviewable. We believe this Court should first consider whether the decision was reviewable before turning to the merits.

In *Webster v. Doe*, 486 U.S. 592 (1998), the Supreme Court held that it could not review the CIA director's decision to fire an employee because Section 102(c) of the National Security Act "allow[ed] termination of an Agency employee whenever the Director 'shall deem such termination necessary or advisable." *Webster*, 486 U.S. at 600. The Court noted that "[t]his standard fairly exudes deference to the Director, and appears to [the Court] to foreclose the application of any meaningful judicial standard of review." *Id*. In the present case, Section 4(b)(2) exudes a similar deference to the agency. FWS not only has complete discretion over how it considers the benefits, but the agency also has complete discretion to choose *not to* exclude areas from designation. *See* H.R. Rep. No. 95-1625, at 17 ("The consideration and weight given to any particular impact is completely within the Secretary's discretion"). Because Section 4(b)(2) defers to the agency's discretion regarding decisions not to exclude instead of providing judicially manageable standards, the agency's decision not to exclude is committed to the agency's discretion by law.

All courts that have considered the issue have found that a determination not to exclude is unreviewable. In *Cape Hatteras Access Preservation Alliance v. U.S. Dept. of the Interior*, 731 F. Supp. 2d 15, 28-29 (D.D.C. 2010), the court acknowledged the "strong presumption that

agency action is reviewable," yet found that "[t]he plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat." In *Home Builders Ass'n of Northern California v. U.S. Fish & Wildlife Service*, 2006 WL 3190518 at *20 (E.D. Cal. 2006), the court noted that the ESA "provides a standard by which to measure an agency's choice to exclude an area based on economic or other considerations," but found that the statute has "no substantive standards by which to review the FWS's decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion." *See also Bldg. Indus. Ass'n of Bay Area*, *supra,* 2012 WL 6002511 at *7 ("section 4(b)(2) of the ESA does not provide any standard by which to judge an agency's decision not to exclude an area from critical habitat designation," and accordingly the decision not to exclude is "committed to agency discretion by law"); *Bear Valley Mut. Water Co. v. Salazar*, 2012 WL 5353353 at *14 (C.D. Cal. 2012) (same); *Aina Nui Corp. v. Jewell,* No. CIV. 13-00438 DKW, 2014 WL 4905076, at *21, n.4 (D. Haw. 2014) (same). This Court should likewise find that the determination not to exclude Unit 1 is not reviewable.

C. Even if reviewable, the decision not to exclude Unit 1 should be upheld.

Even if reviewable, the record here does not permit a conclusion that FWS's determination not to exclude Unit 1 was arbitrary or capricious. Landowners' complaint (Br. 42) that "[t]he final Economic Analysis used by the Service in preparing the Final Rule shows no direct benefit to the conservation of the species" ignores that the purpose of the Economic Analysis is to consider economic impacts, not to assess benefits to the species. As FWS explained, "[t]he selection of sites to be included in critical habitat is based, first and foremost, on the needs of the species." 77 Fed. Reg. 35,122, ROA.633. That is consistent with the statutory directive that FWS "shall" designate critical habitat, 16 U.S.C. § 1533(a)(3)(A)(i), including unoccupied habitat where it is essential for the conservation of the species, 16 U.S.C. § 1532(5)(A)(ii). While FWS considers the economic benefits of the designation, *see* AR.6676-6678, it plainly was not required to justify the designation of critical habitat based upon those economic benefits.

The primary benefit of designating critical habitat is that the conservation of the species is furthered by providing protection for that

habitat from actions of the federal government.[10] Unit 1 is plainly of great value for the conservation of the frog because it contains the best remaining breeding habitat for the species, and is far enough away from other critical habitat to serve as a refuge in case of stochastic events. 77 Fed. Reg. 35,124, ROA.635. FWS is not required to quantify this benefit. 77 Fed. Reg. 35,141, ROA.652 ("because the Service believes that the direct benefits of the designation are best expressed in biological terms, this analysis does not quantify or monetize benefits"). With regard to Unit 1, it was sufficient for FWS to point out that the possible economic costs of designating that area are "not disproportionate" given the high potential value for recovery of the frog offered by the unique habitat found thereon. 77 Fed. Reg. 35,141, ROA.652.

The reasonableness of not excluding Unit 1 is particularly clear given that any economic impacts of designation are far from certain. While landowners highlight the uncertainties involved in determining the biological value of Unit 1 to recovery of the frog, they neglect the major

[10] There are other related benefits from critical habitat designation. In its recent proposed revisions to regulations for designating critical habitat, FWS observed that specifying the geographic location of critical habitat facilitates efforts of federal agencies to focus their conservation programs on important areas, and "also helps focus the conservation efforts of other conservation partners, such as State and local governments, non-governmental organizations, and individuals." 79 Fed. Reg. 27,066 (2014).

uncertainties involved in predicting possible economic impacts. As the Economic Analysis showed, economic costs to landowners may be small or non-existent if the landowners continue the current use of the property for timber production or if they propose development that avoids wetlands under the jurisdiction of the Clean Water Act. AR.6625. The extent of any economic costs depends on a host of contingencies, including the extent of any proposed future development, the nature of federal agency approval that is required, and whatever limits may or may not emerge from the consultation that accompanies such federal agency action. AR.6625-26.

Landowners make much of the fact that the economic costs estimated from the designation of areas besides Unit 1 were lower, and suggest that FWS failed to explain this alleged discrepancy. Br. 21, 42. But the reasons for the difference were fully explained. For occupied habitat, the costs of consultation and any consequent limits on development was attributed to the listing of the frog, which itself imposes habitat protection requirements. AR.6626. Other unoccupied units were already being managed for the benefit of the frog and hence those costs were not attributed to the designation. As FWS explained, the fact that Unit 1 designation impacts appear larger than impacts of designation of other areas stems from the fact that all potential economic impacts to Unit 1 from future Section 7

consultations were attributed to the designation itself. AR.6626-27. In any event, nothing in the statute or in logic suggests that if costs attributable to designation are low for some areas, FWS cannot designate other areas where costs attributable to designation may be higher, particularly where such an area is determined to be "essential" for conservation of the species.

Thus, even if the determination not to exclude Unit 1 is reviewable, landowners have done nothing to show that the determination was arbitrary or capricious.

IV. The requirement that FWS designate unoccupied habitat determined to be essential to the conservation of listed species is within Congress' constitutional authority.

The district correctly found that the landowners' challenge to Congress' authority to authorize the designation of unoccupied habitat like Unit 1 as critical habitat was "foreclosed by binding precedent." Order at 24, ROA.2015. In *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), *cert. denied*, 125 S. Ct. 2898 (2005), this Court rejected a nearly identical constitutional challenge to the regulation of habitat on private lands for the benefit of endangered species (five cave-dwelling insects) for which there was no commercial market. 326 F.3d at 625. The Court's reasoning in that case precludes any argument here that Congress lacks the power to regulate the destruction or adverse modification, via

federally-approved action, of habitat on Unit 1 that has been determined by FWS to be essential for the conservation of the frog.

Like the challengers in *GDF Realty*, landowners attempt to show a constitutional violation by carving out one piece of the interrelated protections of the ESA for the habitat of endangered species. They expressly "acknowledge" at Br. 51 that "properly limited and confined to the statutory definition, the 'critical habitat' provisions of the ESA are indeed within the legitimate powers of Congress." They contend only that Congress lacks authority under the Commerce Clause to direct FWS to designate unoccupied habitat with characteristics similar to Unit 1. *See* Br. 47 ("designating Unit 1 and other lands like it as 'critical habitat' is not essential to the ESA's comprehensive regulatory scheme, and the overall scheme would not be undercut by removing such lands from the reach of the statute"). Landowners' attempt to carve out a small piece of the ESA's protective regulatory scheme is no more convincing here than it was in *GDF Realty*.

This Court began its analysis in *GDF Realty* by stressing:

> "In reviewing an act of Congress passed under its Commerce Clause authority, we apply the rational basis test as interpreted by the *Lopez* court." *Groome Resources, Ltd. v. Parish of Jefferson*, 234 F.3d 192, 203 (5th Cir.2000). In other words: "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional

> enactment only upon a *plain showing* that Congress has exceeded its constitutional bounds." *Morrison*, 529 U.S. at 607, 120 S. Ct. 1740 (emphasis added).

326 F.3d at 627. No such "plain showing" was made in *GDF Realty*, nor has it been here. This Court explained that "the scope of inquiry is primarily whether the expressly regulated activity substantially affects interstate commerce, *i.e.*, whether takes, be they of the Cave Species or of all endangered species in the aggregate, have the substantial effect." *GDF Realty*, 326 F.3d at 633.

The activity regulated by reason of FWS's designation of unoccupied habitat as critical habitat pursuant to 16 U.S.C. § 1533(a)(3)(A)(i) is whatever future activity by the landowners might: 1) require federal approval and thereby invoke the consultation provisions of 16 U.S.C. § 1536(a)(2); and 2) be found to result in the destruction or adverse modification of designated habitat. Hence, the scope of inquiry must be primarily whether such federally-approved activity that destroys or adversely modifies designated critical habitat, whether of the frog or of all endangered species in the aggregate, has a substantial effect on interstate commerce. *GDF Realty*, 326 F.3d at 633.[11]

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[11] There is no substance to landowners' contention that Congress here was attempting to regulate inactivity by compelling individuals to "'become

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This Court in *GDF Realty* found that activity which destroys the habitat of listed species, even highly localized species like rare cave insects, has a substantial effect on interstate commerce. FWS had notified landowners in Texas that their proposed development would likely constitute a "take" of the cave species prohibited by 16 U.S.C. § 1538(a)(1)(B), since "take" is defined in the Act to include "harm,"[12] and since FWS regulations define "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[13] 326 F.3d at 625-26. The Court found that the loss of endangered and threatened species through destruction or degradation of habitat had substantial effect on interstate commerce. The Court pointed out that the "ESA's drafters were concerned by the 'incalculable' value of the genetic heritage that might be lost absent regulation." *Id.* at 639. In addition:

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active.'" Br. 50 n.98 (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2587 (2012)). As explained *supra* at 6, the designation of critical habitat regulates federal agency activities or federal approvals of private proposals that would destroy or adversely modify the designated habitat. The landowners will be subject to regulation only if they propose some action that requires federal approval. The critical habitat provisions of the ESA do not require a private landowner to take any actions.

[12] *See* 16 U.S.C. § 1532(19).

[13] *See* 50 C.F.R. § 17.3 (definitions).

> Aside from the economic effects of species loss, it is obvious that the majority of takes would result from economic activity. *See, e.g.*, 16 U.S.C. § 1531(a)(1) ("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 U.S.C. § 1533(f) (recovery plans should give priority to species that are in "conflict with construction or other development projects or other forms of economic activity * * *"). Indeed, Congress' findings are reflected in the case at hand: the Cave Species takes would occur as a result of plaintiffs' planned commercial development.

Id.[14]

This Court in *GDF Realty* also expressed agreement with FWS's position in that case that "takes of any species threaten the 'interdependent web' of all species." *Id.* at 640. The Court found that FWS's position was consistent with statements in the legislative history that the "essential purpose" of ESA is "to protect the ecosystems upon which we and other species depend." *Id.* (quoting H.R. Rep. No. 93–412 at 6, 10 (1973)). In light of the fact that humans also depend on the web of species and ecosystems, the Court found that "analysis of the interdependence of

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[14] In this case as well, any future regulation would occur in response to the landowners' commercial development plans, which further confirms that such regulation is authorized by the Commerce Clause. *See United States v. Morrison*, 529 U.S. 598, 611 (2000) (explaining that in the two recent cases where statutes were found to fall outside Congress' Commerce Clause authority (*Lopez* and *Morrison* itself), "neither the actors nor their conduct ha[d] a commercial character") (quoting *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring)).

species compels the conclusion that regulated takes under ESA do affect interstate commerce." *Id.* at 640. The Court concluded that the constitutional challenge failed because the "ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it," and that accordingly, "Cave Species takes may be aggregated with all other ESA takes." *Id.*

The validity of the aggregation principle applied in *GDF Realty* was confirmed by the Supreme Court's subsequent decision in *Gonzales v. Raich*, 545 U.S. 1 (2005). Like landowners here (see Br. 51), the challengers in *Raich* conceded that Congress generally had power under the Commerce Clause to regulate the activity in question (manufacture and possession of controlled substances) but attempted to carve out an exception where such regulation was applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law. The Supreme Court framed the question as whether Congress had a rational basis for concluding that the activities in question "taken in the aggregate, substantially affect interstate commerce." 545 U.S. at 22. "That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme." *Id.*

All other Circuit Courts that have considered Commerce Clause challenges to the ESA's protection of species and their habitat have reached the same conclusion as this Court in *GDF Realty*. In *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007), the Court found that "the 'comprehensive scheme' of species protection contained in the Endangered Species Act has a substantial effect on interstate commerce," stemming from the value of species and their genetic diversity and the fact that a species presence in its natural habitat can stimulate commerce by encouraging tourism, hunting and fishing. The Court pointed out that "[b]ecause Congress could not anticipate which species might have undiscovered scientific and economic value, it made sense to protect all those species that are endangered." 477 F.3d at 1275 (citing *GDF Realty*, 326 F.3d at 632). The Fourth, Ninth, and D.C. Circuits have also rejected Commerce Clause challenges to various aspects of the ESA, for similar reasons. *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1176 (9th Cir. 2011) (summarizing how cases have found "why the protection of threatened or endangered species implicates economic concerns"); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1052-54 (D.C. Cir. 1997); *see also* 77

Fed. Reg. at 35,120 (FWS notes that the designation of critical habitat for the gopher frog is constitutional, based on *GDF Realty* and the other Circuit Court decisions upholding constitutionality of ESA).[15]

Section 4's provision for the designation of critical habitat is "an essential part" of the "larger regulation of economic activity" accomplished by the ESA. *See Alabama-Tombigbee*, 477 F.3d at 1274 (the provision for listing species as endangered and threatened "is an essential part" of the "larger regulation of economic activity" accomplished by the ESA). It is not possible to draw a meaningful distinction for Commerce Clause purposes between the habitat protection provided by the ESA's prohibition on "takes," considered in *GDF Realty*, and the habitat protection provided by the designation of critical habitat. Congress recognized that one of the primary causes of species becoming endangered was "the present or threatened destruction, modification, or curtailment of its habitat or

[15] Landowners cite a recent Utah district court decision which found that "takes of Utah prairie dogs on non-federal land — even to the point of extinction — would not substantially affect the national market for any commodity regulated by the ESA." *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Svc.*, -- F. Supp. 3d --, 2014 WL 5743294, at *7-8 (D. Utah, 2014), appeal filed, No. 14-4151 (10th Cir., Dec. 30, 2014). That decision is clearly contrary to this Court's ruling in *GDF Realty*, as well as the rulings of all other courts that have reviewed challenges to the provisions of the ESA as applied to purely intrastate species without obvious commercial value.

range." 16 U.S.C. § 1533(a)(1)(A). The designation of unoccupied essential habitat addresses this particular cause of species endangerment, and provides a means to help recover species to the point where they are no longer endangered. *See Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 441-42 (5th Cir. 2001) ("'[c]onservation' is a much broader concept than mere survival," since "'conservation' speaks to the recovery of a threatened or endangered species"). Designating unoccupied habitat is thus a critical aspect of the regulatory scheme aimed at recovering currently endangered species, and thereby preserving "the 'incalculable' value of the genetic heritage that might be lost absent regulation." *GDF Realty*, 326 F.3d at 639.

Accordingly, landowners cannot simply carve out the designation of critical habitat in circumstances that resemble this case and claim a lack of effect on commerce. *See* Br. 46 ("[t]here is simply no rational basis to conclude that the use of Unit 1 will substantially affect interstate commerce by causing harm to any species"). As the Supreme Court reiterated in *Raich*, "when 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" 545 U.S. at 17 (quoting *Lopez*, 514 U.S. at 558); *see also Alabama-Tombigbee*, 477 F.3d at 1272-73. Because the

ESA is an "economic regulatory scheme" and FWS's designation of critical habitat is "'essential' to that regulatory scheme," the effect of the gopher frog's critical habitat designation is properly aggregated with "those of all other endangered species." *GDF Realty*, 326 F.3d at 638-39.

Accordingly, the district court did not err in upholding the constitutionality of the ESA's provision for designating unoccupied habitat that is determined to be essential for the conservation of a listed species.

V. Landowners cannot bring an APA challenge to FWS's compliance with NEPA, since their interests are outside the zone of interests protected by NEPA.

The district court rejected the landowners' claim that FWS should have prepared an environmental impact statement for the designation of critical habitat, finding that NEPA does not apply where the agency action does not effectuate any change in the environment. Order at 48, ROA.2039 (citing *Sabine River Auth. v. U.S. Dept. of* Interior, 951 F.2d 669, 679 (5th Cir. 1992)). While this ruling was correct (*see infra* at 59-62), we believe that this Court should first reach a threshold issue raised by FWS in its summary judgment motion (ROA.1211), namely whether the landowners'

interests, which are economic rather than environmental, fall within the zone of interests protected by NEPA.[16]

The Supreme Court "has long held that a person suing under the APA must satisfy not only Article III's standing requirements, but an additional test: The interest he asserts must be 'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (quoting from *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970)); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990) ("*Lujan*") (plaintiff bringing NEPA claim must establish that injury complained of falls within the zone of interests sought to be protected by that statute).[17] The

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[16] While the district court did not resolve whether landowners came within the zone of interests of NEPA, it stated that "prudential standing for NEPA claims is doubtful, given the economic nature of the harm asserted by the plaintiffs and the environmental interests protected by NEPA." ROA.2036, n.36. This Court may affirm the district court on the alternative ground presented here and in the district court. *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1146 (5th Cir. 1993) ("Where, as here, the movants for summary judgment advanced several independent arguments in district court in support of their motions for summary judgment, we will affirm if any of those grounds support the district court's decision").

[17] The zone of interests requirement for bringing an action under the APA was often referred to as a "prudential standing" requirement. The Supreme Court recently clarified that "'prudential standing is a misnomer' as applied to the zone-of-interests analysis," *Lexmark Int'l, Inc. v. Static Control*

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landowners have fallen far short of showing that their asserted injuries – which are purely economic – fall within the zone of interests protected by NEPA.

In *Sabine River,* this Court considered a water authority's claim that FWS's acceptance of certain conservation easements required NEPA compliance. That claim was found to come within the zone of interests of NEPA because "the injuries alleged by the plaintiffs in their complaints—harmful effects on the quality and quantity of East Texas' water supply—'are among the sorts of interests' that NEPA was specifically designed to protect." 951 F.2d at 675 (quoting *Lujan,* 497 U.S. at 886). This Court made clear, however, that a plaintiff who claimed only economic injury – such as a contractor who lost an opportunity to build a project that the challenged easements precluded – "would not have standing under the 'zone of interests' test because NEPA was not designed to protect contractors' rights: it was designed to protect the environment." 951 F.2d at 676.

Components, Inc., 134 S. Ct. 1377, 1386 (2014) (quoting *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 675–76 (D.C. Cir. 2013) (Silberman, J., concurring)). The requirement for showing that the plaintiffs' injury falls within the zone of interests of the statute invoked, however, has not been modified.

Other courts have similarly found that plaintiffs who suffer only economic injury do not fall within the zone of interests protected by NEPA. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1103 (9th Cir. 2005) ("to assert a claim under NEPA, a plaintiff must allege injury to the environment"); *Town of Stratford v. FAA*, 285 F.3d 84, 88 (D.C. Cir. 2002) ("a NEPA claim may not be raised by a party with no claimed or apparent environmental interest"); *see generally Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 778 (1983) ("[i]f a harm does not have a sufficiently close connection to the physical environment, NEPA does not apply").

The only injury that the landowners allege was caused by the challenged designation of Unit 1 as critical habitat was reduction in the value of their property. *See* ROA.26 (complaint of Markle Interests ¶8); ROA.2161 (complaint of Poitevant landowners ¶55); ROA.2468-68 (complaint of Weyerhauser Co. ¶9). Landowners have not alleged, let alone demonstrated by competent evidence, that the designation of Unit 1 as critical habitat injures them by adversely affecting the quality of the environment. The purely economic injury asserted by landowners does not fall within the zone of interests protected by NEPA, and accordingly

landowners cannot invoke the APA to bring a suit against FWS for alleged non-compliance with NEPA.

VI. The critical habitat designation was not subject to NEPA.

Although this Court has not addressed whether NEPA applies to critical habitat designations, it has made clear that NEPA does not apply to actions that do not alter the physical environment. *See Sabine River*, 951 F.2d at 679 ("[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 Dallas, Texas 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). The Supreme Court and other Circuit Courts have similarly held that NEPA does not apply unless the federal action at issue is "proximately related to a change in the physical environment." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. at 774; *see also Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) ("'where a proposed federal action would not change the status quo,' however, 'an EIS is not necessary'") (quoting *Snake River v. Hodel*, 921 F.2d 232, 235 (9th Cir. 1990)); *Comm. for Auto Responsibility v. Solomon*, 603 F.2d 992, 1003 (D.C. Cir. 1979) (to require

an agency to complete an EIS where its action does not change the status quo "would trivialize NEPA's EIS requirement and diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment").

The designation of critical habitat does not alter the physical environment, nor does it require any action by landowners. For those reasons, FWS has consistently found that NEPA does not apply to its critical habitat designations. *See* 77 Fed. Reg. at 35,128 (ROA.637) (FWS finds that NEPA does not apply to this designation of critical habitat). The Ninth Circuit has squarely ruled that critical habitat designations are not subject to NEPA because they do not cause a change to the physical environment. *Douglas County v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995).[18]

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[18] The Court in *Douglas County* provided two other grounds for holding that NEPA does not apply to critical habitat designations. First, "Congress intended that the ESA procedures for designating a critical habitat replace the NEPA requirements." *Id.* at 1503. Second, "to apply NEPA to the ESA would further the purposes of neither" statute. *Id.* at 1507. In so ruling, the Ninth Circuit noted that it was "reluctant, as was the Sixth Circuit in *Pacific Legal Foundation* [*v. Andrus*], 657 F.2d [829,] 838 [(6th Cir.1981)], to make NEPA more of an 'obstructionist tactic' to prevent environmental protection than it may already have become." *Douglas County*, 48 F.3d at 1508; *see also Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1090 (9th Cir. 2014) (decision to allow the permit for oyster farm in wilderness area to expire "protects the environment from exactly the kind of human

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Landowners respond that "the designation of Unit 1, *if* Unit 1 ever were to be converted to habitat, would call for changes to the physical environment." Br. 52 (emphasis added). That future possibility does not help landowners, however. NEPA applies only to "proposals for * * * major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). As the Supreme Court ruled in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), federal agency determinations that precede the point where an agency proposes a particular action that affects the environment are not subject to NEPA. 427 U.S. at 399-401. As this Court found in *Atlanta Coal. on Transp. Crisis, Inc. v. Atlanta Reg'l Comm'n*, 599 F.2d 1333, 1342 (5th Cir. 1979), *Kleppe* makes clear that "a court had no authority to 'require the preparation of an impact statement to begin at some point prior to the formal recommendation or report on a

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impacts that NEPA is designed to foreclose," and hence is not subject to NEPA). These grounds would support affirmance in this case as well.

The Tenth Circuit took a different, and in our view misguided approach in *Catron Cnty. Bd. of Comm'rs, New Mexico v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429 (10th Cir. 1996). In any event, while that case ruled that a designation of critical habitat was subject to NEPA, that was because the designation at issue had immediate environmental effects that triggered NEPA, such as causing flood damage to county-owned property. 742 F.2d at 1433; *id.* at 1436 ("[t]he record in this case suggests that the impact will be immediate and the consequences could be disastrous"). No such effects from designating critical habitat are present here.

proposal.'" 599 F.2d at 1342, quoting from *Kleppe*, 427 U.S. at 404. As there has been no recommendation or report on a proposal for federal agency action that would affect the quality of the environment on Unit 1, no NEPA duties have arisen.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Appellees are not aware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Georgia, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,884 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I also certify that on this date a copy of the foregoing brief was served via the CM/ECF system or via U.S. mail to the following counsel:

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