Case 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

Cons/w 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,

Intervenor Defendants – Appellees

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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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellants, Markle Interests, L.L.C.; P&F Lumber Company 2000, L.L.C.; PF Monroe Properties, L.L.C.; and Weyerhaeuser Company certify that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellants
Markle Interests, L.L.C.;
P&F Lumber Company 2000, L.L.C.;
PF Monroe Properties, L.L.C.; and
Weyerhaeuser Company

Entities with an interest
None

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Daniel M. Ashe;
United States Department of Interior;
Kenneth Salazar; and
Sally Jewell,
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REQUEST FOR ORAL ARGUMENT

Appellants, Markle Interests, L.L.C., P&F Lumber 2000, L.L.C., PF Monroe Properties, L.L.C., and Weyerhaeuser Company, request oral argument. This appeal will require the Court to interpret and apply the limitations of the Commerce Clause of Article I of the United States Constitution. This appeal will also require the Court to consider the discretion afforded to federal agencies and the extent to which a discretionary decision by a government agency is subject to judicial review under Article III. Lastly, this appeal will require this Court to consider the proper deference owed to a radically expansive interpretation of the Endangered Species Act. Oral argument may assist the Court in resolving these issues.

Finally, oral argument may also assist the Court in resolving discrepancies about how the facts purportedly supporting the agency's Final Rule in this matter are not consistent with the final decisions made by the agency. The agency's findings are clearly erroneous and unsupported by the administrative record, as the agency has failed to articulate the facts that support its Final Rule. For these reasons, Appellants respectfully submit that oral argument may assist the Court in deciding this case.

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JURISDICTIONAL STATEMENT

Markle Interests, L.L.C.; P&F Lumber Company 2000, L.L.C.; PF Monroe Properties, L.L.C; and Weyerhaeuser Company (the "Landowners") appeal from (1) the Judgments rendered against them, dated August 27, 2014; and (2) the District Court's August 22, 2014 Order & Reasons, denying in part their Motions for Summary Judgment and granting in part the cross-motions for summary judgment filed by the U.S. Fish and Wildlife Service (the "Service"); Daniel M. Ashe, in his official capacity as Director of the Service; the U.S. Department of the Interior; and Sally Jewell, in her official capacity as Secretary of the Department of the Interior (collectively, the "Federal Defendants"), and by the Center for Biological Diversity and the Gulf Restoration Network (the "Intervenor Defendants"). The Judgments and the Order and Reasons were entered by the Honorable Martin L. C. Feldman in the United States District Court for the Eastern District of Louisiana.

The Landowners timely filed separate Notices of Appeal, dated August 26, 2014, August 28, 2014, and September 5, 2014, upon entry of the Judgments and the District Court's Order and Reasons. This Court consolidated the appeals by order dated September 10, 2014. This Court has jurisdiction over the appeals under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Under the Administrative Procedure Act, is it arbitrary and capricious for the Fish and Wildlife Service to designate private lands as critical habitat for an endangered species when the species does not occupy the land, the land is currently unsuitable for habitation by the species, and the Service has not provided a rational explanation as to how the land will contribute to the conservation of the species?

2. Did the Fish and Wildlife Service abuse its discretion by failing to properly consider and weigh the economic impact of its critical habitat designation, as required by statute, when over 99% of the potential economic impact of the designation fell upon the one unit of Louisiana land that is unsuitable for habitation by the species, causing up to $33.9 million in lost development potential?

3. If the Endangered Species Act allows the Fish and Wildlife Service to regulate purely intrastate activities on private land that have no rational connection to the species in question, does the Act exceed Congress's powers under the Commerce Clause?

4. Under the National Environmental Policy Act, was the Fish and Wildlife Service required to prepare an Environmental Impact Statement after declaring that physical changes to the environment were necessary to make the land suitable for habitation by the species?

STATEMENT OF THE CASE

I. The Fish and Wildlife Service lists the Mississippi gopher frog as an endangered species and issues a proposed rule to designate 1,957 acres of suitable land in Mississippi as "critical habitat."

In 2001, the Fish and Wildlife Service (the "Service") listed the Mississippi gopher frog as an endangered species.[1] The Mississippi gopher frog is darkly colored, with a "stubby appearance," a back densely covered with warts, and a "belly . . . thickly covered with dark spots and dusky markings from chin to mid-body."[2] Historically, it was present in parts of Louisiana, Mississippi, and Alabama, ranging from east of the Mississippi River to the Mobile River delta.[3] At the time of listing, however, it was known to exist at only one site in Harrison County, Mississippi.[4] The Service estimated that only 100 adult frogs remained at that site.[5] The Service found that "[h]abitat degradation is the primary factor in the loss of gopher frog populations."[6]

In 2007, the Center for Biological Diversity and the Friends of Mississippi Public Lands sued the Service for its failure to designate critical habitat for the

[1] Final Rule to List the Mississippi Gopher Frog as Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001).

[2] *Id.* at 62,993.

[3] *Id.*

[4] *Id.* at 62,994.

[5] *Id.* at 62,995.

[6] *Id.* at 62,994.

Mississippi gopher frog.[7] In connection with its settlement of that lawsuit, the Service issued a Proposed Rule in June 2010 to designate 1,957 acres in Mississippi as critical habitat.[8] At that time, "two new naturally occurring populations of the Mississippi gopher frog [had been] found in Jackson County, Mississippi."[9] Additionally, the frogs had been successfully reintroduced to an additional site in Harrison County.[10]

In designating critical habitat, the Service searched for "additional locations . . . with the potential to be occupied" by the frog.[11] The Service determined, "[a]fter reviewing the available information from the areas in the three States that were historically occupied by the Mississippi gopher frog, . . . that most of the potential restorable habitat for the species occurred in Mississippi."[12] The Service explained:

> Due to the paucity of available suitable habitat for the Mississippi gopher frog, we have worked with our State, Federal, and nongovernmental partners to identify and restore upland and wetland habitats to create appropriate translocation sites for the species. We identified 15 ponds and associated forested uplands which we

[7] Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog (the "Proposed Rule"), 75 Fed. Reg. 31,389 (June 3, 2010).

[8] *Id.* at 31,387, 31,395.

[9] *Id.* at 31,389.

[10] *Id.*

[11] *Id.*

[12] *Id.* The Service further explained: "Habitat in Alabama and Louisiana is severely limited, so our focus was on identifying sites in Mississippi." *Id.* at 31,394.

> considered to have restoration potential. . . . Ongoing habitat management is being conducted at these areas to restore them as potential relocation sites for the Mississippi gopher frog.[13]

The Proposed Rule identified 11 units in Mississippi to be designated as critical habitat.[14] The 11 units comprised land in the DeSoto National Forest, "Federal land being managed by the State [of Mississippi] as a Wildlife Management Area," and "private land being managed as a wetland mitigation bank."[15] Four of the eleven units were completely or partially occupied by the frog at the time of the proposed rule, whereas the remaining units were unoccupied.[16] Critically, however, *all* of the unoccupied areas were being "actively manag[ed] . . . to benefit the recovery of the Mississippi gopher frog."[17] The Service explained its rationale for including the unoccupied areas:

> The range of the Mississippi gopher frog has been severely curtailed, occupied habitats are limited and isolated, and population sizes are extremely small. While the four occupied units provide habitat for current populations, they may be at risk of extirpation and extinction from stochastic events that occur as periodic natural events or existing or potential human-induced events . . . . The inclusion of essential

[13] *Id.* at 31,389. *See also id.* at 31,391-92 ("Due to the low number of occupied sites for the species, we are conducting habitat management at potential relocation sites with the hope of establishing new populations.").

[14] *See id.* at 31,396-99.

[15] *Id.* at 31,394.

[16] *See id.* at 31,396-99.

[17] *Id.*

> unoccupied areas will provide habitat for population translocation and will decrease the risk of extinction of the species.[18]

II. The Service later revises its proposed rule to include over 1,500 acres of privately-owned land in Louisiana that is plainly unsuitable as habitat.

In September 2011, the Service issued a Revised Proposed Rule expanding the critical habitat designation from the original 1,957 acres to 7,015 acres.[19] The Service explained that, during the comment period for the initial Proposed Rule, "peer reviewers and other commenters indicated they believed that the amount of critical habitat proposed was insufficient for the conservation of the Mississippi gopher frog and that additional habitat should be considered throughout the historical range of the species."[20] Accordingly, the Service expanded the radius of protection around locations determined to be frog breeding sites.[21] However, the Service also designated an entirely new unit ("Unit 1") consisting of 1,649 acres of privately owned land in St. Tammany Parish, Louisiana, based on a report that gopher frogs were seen on a small portion of the site over 45 years earlier.[22] The Service explained:

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[18] *Id.* at 31,395.

[19] Revised Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog (the "Revised Proposed Rule"), 76 Fed. Reg. 59,774 (Sept. 27, 2011).

[20] *Id.* at 59,776.

[21] *See id.* at 59,781.

[22] *Id.* at 59,781, 59,783.

> [Unit 1] is currently unoccupied; however, one of the ponds in the unit is where gopher frogs were last observed in Louisiana in 1965. We believe this unit is essential for the conservation of the species because it provides additional habitat for population expansion outside of the core population areas in Mississippi. Unit 1 consists of five ponds (ephemeral wetland habitat) and their associated uplands. *If* Mississippi gopher frogs are translocated to the site, the five areas are in close enough proximity to each other that gopher frogs could move between them. The uplands associated with the ponds do not currently contain the essential biological and physical features of critical habitat; however, *we believe them to be restorable with reasonable effort.* We believe this unit provides *potential* for establishing new breeding ponds and metapopulation structure which will support recovery of the species. Maintaining these ponds as suitable breeding habitat, into which Mississippi gopher frogs *could* be translocated, is essential to decrease the risk of extinction of the species resulting from stochastic events and to provide for the species' eventual recovery.[23]

Although Unit 1 may have the "potential" to serve as suitable habitat for the frog, if it were modified, it is in fact entirely owned by private parties (the Appellants before this Court) who have no intention of converting it into a frog habitat. The parties who collectively own approximately 90% of the land in Unit 1 made it clear in their public comments that they would not give permission to translocate the frogs or recreate suitable habitat.[24] Instead, they have leased the

[23] *Id.* at 59,783 (emphasis added).

[24] *See* March 2, 2012 Public Comment on Behalf of P&F Lumber, Etc., at 17 (AR. 1866) [Citations to the administrative record are designated "AR." and all pages cited in the administrative record may be found in the Record Excerpts filed with this Brief]; *see also id.* at 2 (AR. 1853) ("The frog will never be present on the Lands as the FWS cannot move the frog there and the Landowners will not allow them to be moved there . . . ."); *id.* ("The Lands do not now, and will not in the future, contain the required 'primary constituent elements' the FWS says are needed for the frog to live on the Lands."); November 23, 2011 Public Comment on Behalf of

land for timber operations for the foreseeable future, and intend to develop homes and businesses on the land when this becomes feasible.[25] Furthermore, Weyerhauser, the owner of the remaining interest in the land, intends to continue using its land for timber operations in a way that is incompatible with the Service's "hopes" for the site.[26] The Service itself recognized that without the cooperation of the Landowners, there is no rational way to convert Unit 1 into suitable habitat:

> The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require the implementation of restoration, recovery, or enhancement measures by non-Federal landowners.[27]

III. The Service includes the Louisiana land in its final designation of "critical habitat" based on an entirely unsupported "hope" that the Landowners would forgo development and timber operations and instead allow their land to be transformed into a frog "refuge."

The Service issued its Final Rule on June 12, 2012, which announced that the "Mississippi gopher frog" would henceforth be referred to as the "dusky

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P&F Lumber, Etc., at 4 (AR. 1695) ("[I]t is certain that both the critical habitat and the [Mississippi gopher frog] will never exist on the Lands.").

[25] *See* November 23, 2011 Public Comment on Behalf of P&F Lumber, Etc., at 4-5 (AR. 1695-96). As the Service recognized, the timber lease on Unit 1 does not expire until 2043. Final Rule for the Designation of Critical Habitat for the Dusky Gopher Frog (the "Final Rule"), 77 Fed. Reg. 35,118, 35,123 (June 12, 2012) (ROA. 634) [Citations to the district court record are designated "ROA."].

[26] *See* November 28, 2011 Public Comment on Behalf of Weyerhauser, at 2, 5 (AR. 1826, 1829); *see also* Final Rule, 77 Fed. Reg. at 35,123 (ROA. 634).

[27] Revised Proposed Rule, 76 Fed. Reg. at 59,776.

gopher frog."[28] Additionally, the final rule designated a total of 6,477 acres as critical habitat, including the 1,544 acres in St. Tammany Parish newly designated as "Unit 1".[29] The Service identified three "primary constituent elements" ("PCEs"), which are defined by regulation as "the principal biological or physical constituent elements within [a] defined area that are essential to the conservation of the species."[30] These three essential PCEs are:

> (1) small, isolated, ephemeral, acidic breeding ponds having an "open canopy with emergent herbaceous vegetation," appropriate water qualify, surface water present for at least 195 days during the breeding season, and no predatory fish;
>
> (2) upland 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," also having "abundant herbaceous ground cover" and underground habitat in the form of burrows or holes; and
>
> (3) "[a]ccessible upland habitat between breeding and nonbreeding habitats to allow for dusky gopher frog movements between and among such sites," with "open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter . . . during seasonal movements."[31]

The Service's standards for determining critical habitat units confirm what common sense suggests—that the PCEs, being essential for the conservation of the frog, should all be present within any self-contained unit. The Service explained

[28] Final Rule, 77 Fed. Reg. 35,118 (ROA. 629).

[29] *Id.* at 35,118 (ROA. 629).

[30] *Id.* at 35,131 (ROA. 642); *see* 50 C.F.R. § 424.12(b).

[31] Final Rule, 77 Fed. Reg. at 35,131 (ROA. 642).

that its unit boundaries were determined by starting with the locations of the frog breeding site and buffering these locations by a radius of 621 meters.[32] The Service further explained: "We believe the area created will protect the majority of a dusky gopher frog population's breeding and upland habitat *and incorporate all primary constituent elements within the critical habitat unit*."[33] As recognized earlier in the Final Rule, 11 of the 12 units designated as critical habitat do in fact contain all three PCEs.[34] But Unit 1 does not - contrary to the Service's own standard, Unit 1 was designated despite the fact that at best it arguably contains *only one* of the PCEs and therefore lacks two of the elements that are essential to the conservation of the gopher frog.[35]

The Service was clear in explaining that Unit 1 was designated based solely on the presence of five ponds that might potentially serve as breeding grounds for the dusky gopher frog.[36] However, the Service recognized that because Unit 1 "is managed for timber by a company conducting industrial forestry," "the

[32] *Id.* at 35,134 (ROA. 645).

[33] *Id.* (emphasis added).

[34] *Id.* at 35,131 (ROA. 642).

[35] *Id.*

[36] *Id.* at 35,133 (ROA. 644); *see id.* at 35,135 (ROA. 646) ("Maintaining the five ponds within this area as suitable habitat into which dusky gopher frogs could be translocated is essential to decrease the risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery.").

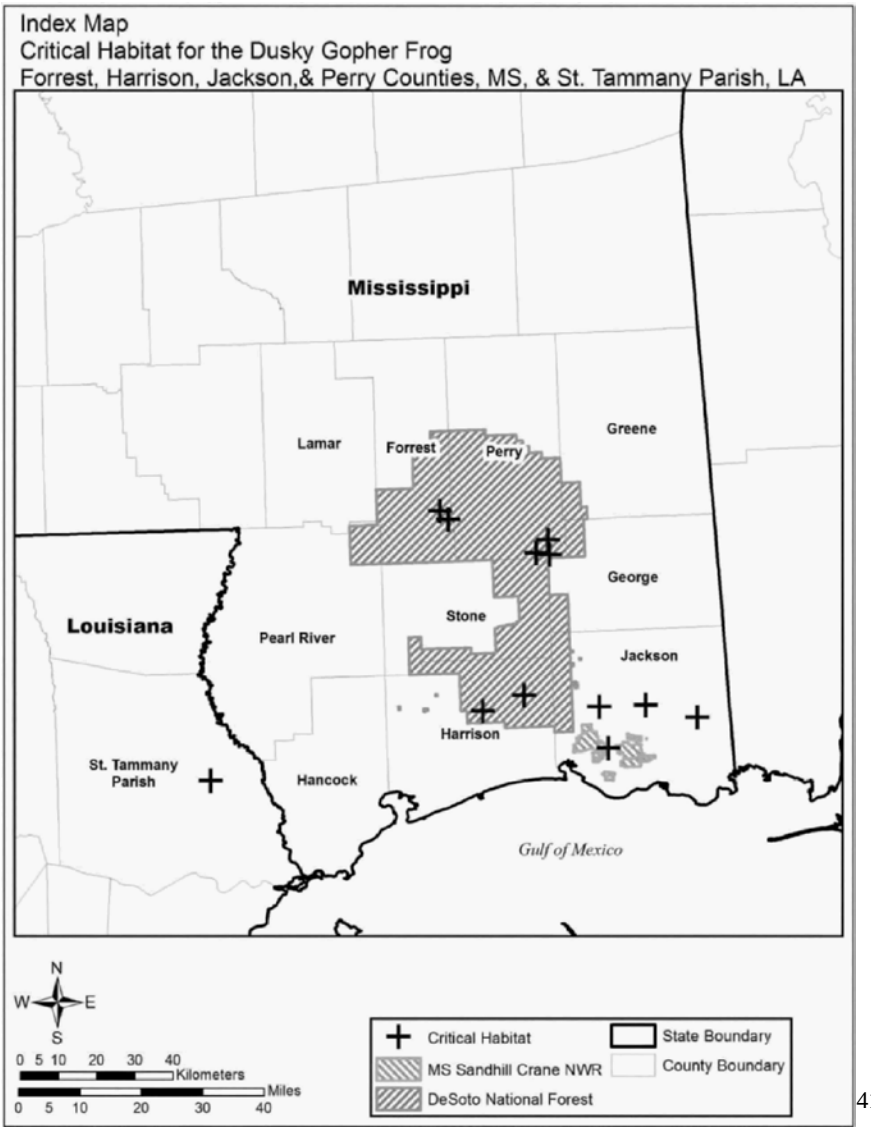
surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs."[37] Specifically, about 90% of Unit 1 consists of closed-canopy (or soon-to-be closed-canopy) loblolly pine plantations,[38] which the Service deems "unsuitable as habitat for dusky gopher frogs."[39] Furthermore, the Service determined that "[o]ptimal habitat is created when management includes frequent fires,"[40] which is inconsistent with the use of the land as a timber plantation.

[37] *Id.* at 35,133 (ROA. 644).

[38] November 28, 2011 Public Comment on Behalf of Weyerhauser, at 5 (AR. 1829).

[39] Final Rule, 77 Fed. Reg. at 35,129 (ROA. 640).

[40] *Id.*



[41]

Viewing the designated units on a map, Unit 1 is curiously distant and isolated from the other units. Whereas the other 11 units are clustered in DeSoto National Forest and Jackson County in eastern Mississippi, Unit 1 is located in Louisiana, at least 50 miles from any of the other units. By comparison, the Service estimates that the range of an individual dusky gopher frog extends less

[41] *Id.* at 35,146 (ROA. 657).

than half a mile from its breeding site.[42] The Service explains, however, that this is by design:

> Habitat in Louisiana is distant from the extant populations of the dusky gopher frog. For this reason, the Louisiana site would likely be affected by different environmental variables than sites in Mississippi. Thus, Unit 1 provides a refuge for the frog should the other sites be negatively affected by environmental threats or catastrophic events.[43]

In other words, Unit 1, which is not known to have contained any dusky gopher frogs since 1965 and is completely unsuitable as habitat, was chosen with the "hope" that it might somehow be transformed into a frog "refuge." Yet the Service made clear that its plans for Unit 1 are entirely aspirational:

> Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, *we hope* to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there.[44]

In light of the Landowners' lawful decision not to manage the site as a frog refuge, this is indeed a vain hope. Moreover, as the Service recognized, "actions such as habitat management through prescribed burning, or frog translocation to the site,

[42] Final Rule, 77 Fed. Reg. at 35,130 (ROA. 641).

[43] *Id.* at 35,124 (ROA. 635).

[44] *Id.* at 35,123 (ROA. 634) (emphasis added).

cannot be implemented without the cooperation and permission of the landowner."[45]

IV. Despite finding an economic loss of up to $33.9 million for the Landowners and no concrete benefit to the conservation of the dusky gopher frog, the Service "did not identify any disproportionate costs that are likely to result from the designation" of Unit 1.

The Service must "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat," and it "may exclude an area from designated critical habitat based on economic impacts." 16 U.S.C. § 1533(b)(2). Before the Final Rule was published, the Service prepared a final Economic Analysis analyzing the potential economic impacts associated with the designation of critical habitat.[46] As the Final Rule explains, this analysis "measures lost economic efficiency associated with residential and commercial development and public projects and activities," and may be used "to assess whether the effects of the designation might unduly burden a particular group or economic sector."[47] Critically, the Service found that "most of the estimated incremental impacts [of the entire critical habitat designation] are related to possible lost development value in Unit 1."[48] The Service recognized that the Landowners "have invested a

[45] *Id.* (emphasis added).

[46] *Id.* at 35,140-41 (ROA. 651-52).

[47] *Id.* at 35,140 (ROA. 651).

[48] *Id.*

significant amount of time and dollars into their plans to develop this area,"[49] and that the critical habitat designation could severely limit, or even foreclose entirely, such development.

"A critical habitat designation provides protection for threatened and endangered species by triggering what is termed a Section 7 consultation in response to actions proposed by or with a nexus to a federal agency." *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 115 (D.D.C. 2004). Under Section 7(a)(2) of the Endangered Species Act (16 U.S.C. § 1536(a)(2)), each federal agency must consult with the Service to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical." Accordingly, any actions undertaken on Unit 1 by the Landowners having a "federal nexus," including actions requiring a federal permit, would trigger a Section 7 consultation.[50]

[49] Final Economic Analysis at 4-3 (¶ 73) (AR. 6663).

[50] For example, if development of the land were to involve any discharge of dredged or fill material into navigable waters (including wetlands), a federal permit would be required under 33 U.S.C. § 1344. This would trigger a Section 7 consultation, in which the Service would be required to insure that actions allowed under the permit would not destroy or adversely modify the dusky gopher frog's critical habitat.

Because of the uncertainty concerning what type of development might ultimately occur on Unit 1, whether a federal nexus would arise, and what types of conservation measures would be required in the event of a Section 7 consultation, the Economic Analysis considered three possible scenarios:

- In the first scenario, development on Unit 1 does not impact wetlands or otherwise present a federal nexus, meaning that Section 7 consultation is not triggered. This results in no incremental economic impact.

- In the second scenario, development requires a federal wetlands permit and therefore triggers a Section 7 consultation. The Service requires 60 percent of Unit 1 to be set aside and managed for the conservation of the dusky gopher frog, allowing the remaining 40% to be developed. This results in lost development value of $20.4 million over 20 years.

- In the third scenario, a Section 7 consultation is triggered and "the Service . . . recommend[s] complete avoidance of development with [Unit 1] in order to avoid adverse modification of critical habitat." This results in lost development value of $33.9 million over 20 years.[51]

Remarkably, the total incremental economic impact of the critical habitat designation on the other 11 units is only $102,000 over 20 years.[52] Under either the second or third scenario, therefore, *more than 99 percent* of the entire economic impact of the critical habitat designation is attributable to the designation of Unit 1. This is primarily because the 11 remaining units were already being

[51] Final Economic Analysis at 4-3, 4-4, 4-7(¶¶ 73-77, 87) (AR. 6663-64, 6667).

[52] Final Rule, 77 Fed. Reg. at 35,140 (ROA. 651).

actively managed for the recovery of the frog, such that "the only additional conservation effort anticipated to be undertaken incrementally as a result of critical habitat designation for [the] gopher frog is *the avoidance of development in Unit 1*."[53]

Despite this heavy economic impact attributable to the designation of one unit that contains neither dusky gopher frogs nor their essential habitat features, the Service was unable to identify any definite direct benefits. Its economic analysis found only ancillary benefits anticipated from the designation, such as increased property value for *adjacent* properties due to decreased development on Unit 1, aesthetic benefits, and possible benefits to the ecosystem.[54] In the Final Rule, the Service stated that "it may not be feasible to monetize or quantify the benefits of environmental regulations," and that "the benefits of the proposed rule are best expressed in biological terms that can then be weighed against the expected costs of the rulemaking."[55] However, the Service never specifically identified these "biological" benefits or attempted to either determine their likelihood or weigh them against the heavy costs imposed on the Landowners. Instead, the Service

[53] Final Economic Analysis at 5-2 (¶ 112) (AR. 6677) (emphasis added).

[54] *Id.*

[55] Final Rule, 77 Fed. Reg. at 35,127 (ROA. 638).

simply concluded, with no further explanation, that its economic analysis "did not identify any disproportionate costs that are likely to result from the designation."[56]

V. The district court, incorrectly interpreting the Administrative Procedure Act to impose a "paralyzing" standard of review, affirmed the Service's designation of Unit 1 despite finding it to be "troubling," "remarkably intrusive," and "overreaching."

After their comments failed to persuade the Service to revise the designation of Unit 1, the Landowners filed three separate lawsuits against the Federal Defendants challenging the Final Rule on statutory and constitutional grounds. The Landowners sought the invalidation of the final designation only insofar as it concerned Unit 1, recognizing that the Service had legitimately designated abundant habitat for the dusky gopher frog in Mississippi. These lawsuits sought identical declaratory and injunctive relief, and were consolidated before the district court. The Center for Biological Diversity and the Gulf Restoration Network were granted leave to intervene, of right, as defendants.

Once the administrative record was lodged with the district court, the parties filed cross-motions for summary judgment.[57] Oral argument was held on August 20, 2014.[58] On August 22, 2014, the district court issued its "Order and Reasons" finding that the Landowners have standing but rejecting their challenges to the

[56] *Id.* at 35,141 (ROA. 651).

[57] ROA. 539, 589, 990, 1197, 1257, 1330, 1410, 1463, 1518.

[58] *See* Transcript (ROA. 2051-2105).

Final Rule.[59] The district judge did not mince words in describing his view of the Service's designation of Unit 1, calling the Service's actions "odd," "troubling," and "harsh," and remarking that "what the government has done is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property."[60] Nevertheless, considering himself to be "restrained" by the standard of review under Administrative Procedure Act ("APA"), which he described as "confining" and "somewhat paralyzing," the district judge reluctantly affirmed the Final Rule.[61] This appeal followed.

SUMMARY OF ARGUMENT

The designation of Unit 1 as critical habitat must be set aside as arbitrary, capricious, and beyond the statutory authority of the Service. The Endangered Species Act ("ESA") allows the Service to designate areas unoccupied by a threatened or endangered species as critical habitat for that species only when those unoccupied areas are *essential* to conservation of the species. Here, the Service designated twelve units of critical habitat for the dusky gopher frog (one in Louisiana and eleven in Mississippi), declaring that the sites were required to establish new populations of the dusky gopher frog to protect it from extinction

[59] Order and Reasons at 1-2 (ROA. 1992-93).

[60] Order and Reasons at 26, 28, 39, 41 (ROA. 2017, 2019, 2030, 2032).

[61] *Id.* at 40, 44 (ROA. 2031, 2035).

and to encourage recovery of the species. In its designation, the Service identified the habitat features that the dusky gopher frog needs to survive. All eleven units located in Mississippi contain all of the features required for the frogs' survival.

The Service, however, also designated Unit 1 in St. Tammany Parish, Louisiana, which the Service admits contains neither the frogs nor the features necessary for their survival. Instead, the Service contends that Unit 1 is "essential to the conservation" of the frog because it is *potentially restorable* through severe modifications in land use, active management (including controlled burns), and, ultimately, artificial reintroduction of the frog. The Landowners, however, have not consented to any modifications or management regimes postulated by the Service or to reintroduction of the frog. To the contrary, the record unequivocally establishes that the land will continue to be committed to other uses. Because the Service cannot compel the Landowners to take the aggressive actions that would be necessary to convert their private property into a frog refuge, Unit 1 will remain unsuitable for the dusky gopher frog for the foreseeable future.

Yet the Service, in a breathtakingly broad interpretation of the ESA, contends that unoccupied land having a potential, speculative benefit to the conservation of the frog nevertheless may be deemed "essential" and therefore designated as critical habitat. Because any land may conceivably be turned into suitable habitat with enough time, effort, and resources, this interpretation gives

the Service nearly limitless authority to burden private lands with a critical habitat designation. Such an interpretation finds no support in the statute or in the legislative history behind the definition of critical habitat. The Service's Final Rule designating Unit 1 as critical habitat is therefore arbitrary, capricious, and beyond the Service's statutory authority under the ESA.

Remarkably, the Service also found no disproportionate impacts in designating any of the twelve units as critical habitat, despite its own economic analysis showing that over 99% of the potential economic impacts of the critical habitat designation were attributable *solely* to the loss of development potential in Unit 1, valued at up to $33.9 million over 20 years. The Service's conclusion is all the more surprising in light of the fact that Unit 1 is the only one of the twelve designated units that currently cannot be inhabited by the frog. Despite the disproportionate impacts on just one unit of designated property and the absence of any direct, concrete benefits to the conservation of the frog, the Service merely stated in conclusory fashion that no disproportionate impacts were found. Because the Service failed to articulate the reasons for the decision or the specific biological benefits attributable to the designation of Unit 1, this designation should be set aside.

If, on the other hand, the Service's designation of Unit 1 is determined to be within the intended application of the statute, the statute so construed exceeds the

powers of Congress under the Commerce Clause. Courts have found the ESA to be authorized under the Commerce Clause based on the predictable effects of possible species extinctions on interstate commerce. By regulating purely intrastate activity on land that has no rational connection to the preservation of any species, however, the Service has drifted away from its constitutional mooring. Moreover, because the designation of Unit 1 and other similarly situated land is not "essential" to the ESA's statutory scheme, it cannot be deemed necessary and proper to Congress's legitimate regulation of interstate commerce.

Finally, if the Service's designation of critical habitat is proper, then its reliance on future modifications to the property to make it suitable habitat should trigger the requirement of an Environmental Impact Statement under the National Environmental Policy Act ("NEPA"). Under NEPA, an Environmental Impact Statement is required when significant federal action will require physical changes to the environment. The Service inconsistently claims, on the one hand, that Unit 1 is critical habitat because, with extensive physical modifications and management, including controlled burnings of forested lands, the unit could be converted into suitable habitat for the frog in the future; meanwhile, Appellees also claim, on the other hand, that NEPA does not apply because the designation of Unit 1 does not require physical modifications. The Service's logic is self-defeating, and cannot

withstand scrutiny. Therefore, the Landowners seek to invalidate the designation of Unit 1 as critical habitat.

ARGUMENT

Review of a district court's grant of summary judgment is *de novo*. *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 627 (5th Cir. 2001). The Federal Rules of Civil Procedure provide for summary judgment when the record reveals no genuine issue of material fact such that the movant is entitled to judgment as a matter of law. Fed. R. Civ. Proc. 56(c).

I. The Landowners plainly have standing to challenge the burdensome regulations that have been imposed on their land.

As the district court correctly noted, when the plaintiff is the object of the government action at issue, "'there is ordinarily little question that the action' has caused him injury."[62] Thus, standing is "self-evident" when a regulated party challenges agency action. *See South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 895-96 (D.C. Cir. 2006). The Landowners have shown that the agency designation of Unit 1 has devalued their land by imposing bureaucratic and regulatory restrictions on development.[63] These impacts are both real and actual,

[62] Order and Reasons at 21 (ROA. 2012) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

[63] *See, e.g.*, Weyerhaeuser's Reply and Memorandum in Opposition to Defendants' Motion for Summary Judgment at 3 (ROA. 1653) (alleging based on declaration of land adjustment manager that the designation and its regulatory scrutiny "has already devalued the land within Unit 1 for

not speculative. The Landowners have suffered an injury-in-fact, traceable to the challenged designation, that would be redressed by the setting aside of the critical habitat designation of Unit 1.[64] They have standing, therefore, under Article III to pursue their claims.

II. The Service's designation of Unit 1 as critical habitat was arbitrary, capricious, and outside of the ESA's mandate.

The district court found that the Service's designation was "remarkably intrusive and has all the hallmarks of governmental insensitivity to private property."[65] Despite this finding, the court held itself to a "paralyzing" standard of review that was not appropriate in this case. As shown below, the Government's argument amounts to a request for a judicial "rubber-stamp" in the face of contradictory and arbitrary reasoning in the Final Rule and an absence of articulated, rational reasons for the decisions made by the Service.

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commercial purposes by making it more difficult to sell, exchange, or develop") (citing Declaration of L. Richard LeBlanc (found at ROA. 1683-85)). *See also* Final Economic Analysis at 2-17 (¶ 51) (AR. 6654) (finding that public attitudes about "the limits or restrictions that critical habitat may impose can cause real economic effects to property owners, regardless of whether such limits are actually imposed"); *see also id.* at 4-3 (¶ 73) (AR. 6663) (noting that the Service's analysis assumed that any reduction in land value due to designation "will happen immediately at the time of the designation").

[64] The Landowners seek to overturn the Final Rule only as to the designation of Unit 1, which would leave intact the designation of the other eleven critical habitat units in Mississippi that are actually capable of contributing to the conservation of the dusky gopher frog.

[65] Order and Reasons at 28 (ROA. 2019)

A. A court reviewing the decision of an agency must ensure that the agency acted within the proper scope of its statutory authority and reached a decision that is rationally connected to the relevant facts.

Under the APA, an aggrieved party may seek judicial review of a final agency action for which there is no other adequate remedy. 5 U.S.C. §§ 702, 704. A reviewing court must "set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"; "contrary to constitutional right, power, privilege, or immunity"; or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* at § 706(2)(A)-(C). Review under this standard is narrow, but "searching and careful." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989).

> Normally, an agency rule would be arbitrary and capricious 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.

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983). A court must decide "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971).

Contrary to the district court's suggestion, the standard of review under the APA is not "paralyzing."[66] "Reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB v. Brown*, 380 U.S. 278 (1965). Likewise "an agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole' . . . does not merit deference." *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013)). "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965).

Moreover, "[j]udicial review is meaningless . . . unless [courts] carefully review the record to 'ensure that agency decisions are founded on a reasoned evaluation of the relevant factors.'" *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife, Bureau of Land Management*, 273 F.3d 1229, 1236 (9th Cir. 2001) (quoting *Marsh*, 490 U.S. at 378). Accordingly, the "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor*

[66] Order and Reasons at 44 (ROA. 2035).

Vehicle Mfrs. Ass'n of U.S., 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

B. The ESA does not allow the designation of unoccupied areas as critical habitat when such areas have only a speculative connection to the conservation of a species.

When the Secretary determines that a species is endangered or threatened, he must also "to the maximum extent prudent and determinable . . . designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i). "In determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection." 50 C.F.R. § 424.12(b). Areas *occupied* by the species at the time it is listed as endangered or threatened may be designated as "critical habitat" only if they contain "those physical or biological features . . . essential to the conservation of the species" that "may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i).

The Secretary may also designate areas *unoccupied* by the species as "critical habitat," but "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). Specifically, unoccupied areas may be designated as critical habitat only "upon a determination by the Secretary that such areas are *essential* for the conservation of

the species." 16 U.S.C. § 1532(5)(A)(ii) (emphasis added). Courts have made clear that the designation of *unoccupied* areas is a "more onerous procedure." *Arizona Cattle Growers Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010); *see also Cape Hatteras*, 344 F. Supp. 2d at 125 ("Designation of unoccupied land is a more extraordinary event that [*sic*] designation of occupied lands.").

Although it is not strictly necessary that every area designated as critical habitat contain all essential habitat elements, land that is unsuitable as habitat must have, at a minimum, some logical connection to the conservation of the species that is not entirely speculative. Otherwise, designation of such unoccupied land as critical habitat fails the basic test of rationality. *Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2442 (2014) ("Even under *Chevron*'s deferential framework, agencies must operate 'within the bounds of reasonable interpretation.'"). For example, in *Alliance for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126 (D. Mont. 2010), the Service decided not to designate certain unoccupied areas of Colorado as critical habit of the lynx. The plaintiffs argued that the areas should be designated because "Colorado contains high elevation terrain that will maintain the necessary snow conditions despite climate change, and thus could serve as a refugium for lynx." *Alliance for Wild Rockies*, 728 F. Supp. 2d at 1142. The Service had declined to designate the area because "the area lack[ed] the other necessary physical and biological features." *Id.* The court found

that the plaintiffs' argument amounted to "little more than an attempt to force the Service to designate backup habitat in the hope it will someday become useful to the lynx." *Id.* at 1142-43. The court confirmed that the Service "may not statutorily cast a net over tracts of land with the mere hope that they will someday acquire the potential to be critical habitat." *Id.* (quoting *Cape Hatteras*, 344 F. Supp. 2d at 122). "To do so would run afoul of the axiom that an agency's decision rationally relate to the facts in the record." *Id.*

By contrast, in a final rule providing a revised critical habitat designation for the Santa Ana sucker, the Service designated certain unoccupied areas as essential to the conservation of the species even though the rule did not contemplate that the species would ever live there. The Service found that there were seven PCEs essential to the conservation of the Santa Ana sucker, and that all occupied units contained all of the PCEs.[67] The Service also found that several unoccupied areas contained streams and tributaries that supported occupied areas by serving as "pathways to transport storm and stream waters," as well as necessary sediments, "to occupied portions of the Santa Ana River."[68] However, the slopes of the streams appeared "too steep to be passable by [the] Santa Ana sucker."[69] In that

[67] Final Rule Revising Critical Habitat for the Santa Ana Sucker, 75 Fed. Reg. 77,962, 77,969 (Dec. 14, 2010).

[68] *Id.* at 77,972-73.

[69] *Id.*

instance, the Service was able to rationally explain why protecting unoccupied and unsuitable lands as critical habitat was essential in supplying essential elements to maintain an adjacent habitat in occupied areas.

C. The Service has exceeded its statutory authority and asserted an almost limitless power to designate private property as "critical habitat" on the basis that it could theoretically be transformed into an endangered species refuge.

In this case, however, the Service has never suggested that Unit 1 plays any sort of supporting role to areas occupied by the dusky gopher frog. Indeed, Unit 1 was chosen, at least in part, based on its remoteness from the other designated units. Rather, the Service was clear in explaining that Unit 1 was designated because it *could* potentially serve as a refuge for an entirely new frog population, *if* (contrary to any reasonable expectation) it is actively managed and restored to a suitable condition. The Service's adoption of such a standard, which could potentially apply to much of the land in the United States, is a radical and unsupported assertion of power that must be reined in by the courts.

The Service claims to have focused on lands containing ephemeral ponds in its search for critical habitat, due to the importance of such ponds for dusky gopher frog conservation and their rarity in the environment.[70] Yet under the Service's reasoning, there is no reason why areas designated as critical habitat would

[70] Final Rule, 77 Fed. Reg. at 35,123, 35,132 (ROA. 634, 643).

necessarily need to contain any ponds. As the Service explains, although "[e]phemeral, isolated ponds are very difficult to establish," the U.S. Forest Service and others have managed to create a pond in the DeSoto National Forest that is currently ready to be used as a reintroduction site for the dusky gopher frog.[71] The Service's reasoning would extend so far as to allow it to designate lands lacking ponds but containing one of the other PCEs, on the ground that the ponds could be established "with reasonable effort." Even beyond this, the Federal Defendants have argued forcefully that the Service may designate areas that are potentially restorable even if they do not currently contain *any* of the elements essential to the dusky gopher frog's habitat.[72]

The Service's reasoning would extend even to designation of developed areas. The Service explained in its Final Rule: "When determining critical habitat boundaries within this final rule, we made every effort to avoid including developed areas, such as lands covered by buildings, pavement, and other structures, *because such lands lack physical or biological features for the dusky*

[71] *Id.* at 35,123 (ROA. 634). The Service explained why creation of artificial ponds is no substitute for designating Unit 1 as critical habitat: "It is highly unlikely that five ponds, similar to those that currently exist in Unit 1, could be created in the landscape within a timeframe that would provide near-term conservation benefits to the dusky gopher frog." *Id.* This certainly raises an obvious question of how Unit 1 could conceivably provide "near-term conservation benefits," given that it is currently unsuitable as habitat and is owned by private parties who have no intention of converting it into suitable habitat.

[72] *See, e.g.*, Federal Defendants' Cross-Motion for Summary Judgment as to Weyerhauser, at 15 (ROA. 1350).

gopher frog."[73] Of course, the Service also determined that Unit 1 "do[es] not currently contain the essential physical or biological features of critical habitat" for the dusky gopher frog; the Service found instead that it is "restorable with reasonable effort."[74] But Unit 1 is currently covered with productive loblolly pine plantations, and the "reasonable effort" suggested by the Service would consist of burning them down or removing them. By the same standard, the Service could just as well determine that buildings should be bulldozed and pavement removed.

D. The history and structure of the ESA show that the term "essential" must be interpreted in a way that provides meaningful limits on the Service's power.

It cannot be overemphasized that, by the express terms of the statute, unoccupied lands may not be designated as critical habitat unless they are *essential* to the conservation of the species. 16 U.S.C. § 1532(5)(A)(ii). The Federal Defendants argued before the district court that the Service is "not required to explicitly define 'essential,'" that it has "the authority to make that determination on a case-by-case basis," and that it need only "explain its considerations for assessing what areas are essential."[75] Although the Service undoubtedly has some discretion in interpreting the statutory language of the ESA, it does not have the

[73] Final Rule, 77 Fed. Reg. at 35,134 (ROA. 645) (emphasis added).

[74] *Id.* at 35,135 (ROA. 646).

[75] Federal Defendants' Cross-Motion for Summary Judgment as to Weyerhauser, at 8-9 (ROA. 1343-44).

authority to apply the term "essential" in a way that is contrary to its plain meaning. *ConocoPhillips Co. v. U.S. E.P.A.*, 612 F.3d 822, 838 (5th Cir. 2010) (finding that where Congress has unambiguously expressed its intent, courts must "reverse an agency's interpretation if it does not conform to plain meaning of statute").

The structure of the ESA demonstrates that the word "essential" must be narrowly interpreted to prevent agency overreach. Importantly, even land that is *actually occupied by an endangered species* cannot be designated as critical habitat absent a showing that it contains "physical or biological features . . . essential to the conservation of the species" that "may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i).

By contrast, the only express requirement in the statutory definition of "critical habitat" for *unoccupied* areas is that "such areas [be] essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). As courts have recognized, it would be nonsensical and counterintuitive if unoccupied lands (which would consist of most lands within the United States) were easier to designate than occupied lands. *See, e.g.*, *Cape Hatteras*, 344 F. Supp. 2d at 125 ("Designation of unoccupied land is a more extraordinary event that [sic] designation of occupied lands."). Yet the only safeguard against this illogical result is an insistence by the courts that "essential" must truly mean *essential*, not

whatever the Service wants it to mean. Unoccupied land cannot rationally be designated as "essential for the conservation of [a] species" if it is not currently supporting the conservation of the species in any way and the Service has no reasonable basis to believe that it will do so at any point in the foreseeable future.

The history of the ESA demonstrates Congress's concern with an overly expansive definition of "critical habitat" and its attempts to limit the scope of the term. When the ESA was originally passed in 1973, the term "critical habitat" was not defined. However, based on concerns that the Service was designating as critical habitat large areas that were not in fact "critical" to the conservation of endangered species, Congress amended the ESA in 1978 to provide a definition and constrict the Service's expansive understanding of critical habitat. The Senate report for the amending legislation criticized the Service for failing to distinguish between areas that are "truly critical to the continued existence of a[n endangered] species" and areas that would merely "extend the range of [the] species." S. Rep. No. 95-874, at 9-10, 95th Cong. 2d Sess. 10.

Similarly, the House report warned that the Service "should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, 95th Cong., 2d Sess. 16, reprinted in 1978 U.S. Code Cong. & Admin. News 9453, 9468. The House report noted with disapproval that "the existing regulatory definition could conceivably lead to the

designation of virtually all of the habitat of a listed species as its critical habitat." *Id.* at 9475. Accordingly, the House report explained, the new definition of "critical habitat" would "narrow[] the scope of the term" by allowing designation of areas "only if their loss would *significantly decrease* the likelihood of conserving the species in question." *Id.* (emphasis added).

The Service failed in its designation of Unit 1 to be "exceedingly circumspect," as the Service itself stated in the Final Rule that Unit 1 is unsuitable for the purpose for which it was designated. The Service asserts that the designation of Unit 1 is justified nevertheless because it *might* extend the range of the frog, *if* the Service is successfully able to restore Unit 1 to suitable habitat for the gopher frog. But the Service admits it is unable to restore Unit 1 to suitable habitat, and its designation of Unit 1 rejects the limiting purpose behind the definition of critical habitat.[76] Accordingly, the Service's designation of Unit 1 is beyond its statutory authority under the ESA.

[76] The Federal Defendants argued before the district court that because critical habitat designations must be made "on the basis of the best scientific data available," 16 U.S.C. § 1533(b)(2), the intent of landowners is irrelevant. Federal Defendants' Cross-Motion for Summary Judgment as to Weyerhauser, at 16 (ROA. 1351). Science, however, exists in the real world, not an abstract plane, and the Service's stated reliance on "science" cannot excuse a regulation that fails the basic test of rationality because its ends are disconnected from its means. Furthermore, the statute itself makes clear that "scientific data" is not the sole consideration in critical habitat designations, as the Service must also "tak[e] into consideration the economic impact, the impact on national security, and any other relevant impact." 16 U.S.C. § 1533(b)(2).

E. The district court failed to consider whether the Service's designation of Unit 1 is rationally connected to its goal of conserving the dusky gopher frog.

The district court concluded, albeit erroneously, that the Service's "finding that the unique ponds located on Unit 1 are essential for the frog's recovery" was supported by the law and the record.[77] The district court relied on the following main premises in reaching its conclusion: (1) peer reviewers criticized the initial Proposed Rule as designating insufficient critical habitat and failing to designate critical habitat outside Mississippi, which would protect against localized threats to Mississippi population; (2) the Service was unable to locate any areas outside Mississippi containing all of the essential habitat elements for the dusky gopher frog; (3) it is easier to restore terrestrial habitat than to restore or create breeding ponds; (4) Unit 1 contains five ponds in close proximity that could support a "metapopulation structure," which would further the long-term survival and recovery of the frog; and (5) the ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the [frog's] historic range"[78]

As the district court noted, the Landowners do not challenge any of these premises as a factual matter. What the district court failed to recognize, however,

[77] Order and Reasons at 32 (ROA. 2023).

[78] *Id.* at 29-31 (ROA. 2020-22).

is that the "unique ponds" on Unit 1 are of absolutely no use to the frogs unless the surrounding habitat is completely transformed and frogs are reintroduced there. Likewise, the district court failed to consider that the Service cannot utilize the ponds for the benefit of the frogs without the cooperation of the Landowners, which the Service cannot compel. The district court misunderstood the Landowners' argument entirely, perceiving them to be arguing that "Unit 1 can not be 'essential' for the conservation of the frog because the frog does not even live there" and "hasn't been sighted there since the 1960s."[79] The Landowners certainly do not take issue with the plain language of the ESA, which states unambiguously that unoccupied areas may be designated as critical habitat. *See* 16 U.S.C § 1532(5)(A)(ii). The Landowners' argument was, and is, that unoccupied land cannot rationally be designated as "essential for the conservation of [a] species" if it is not currently supporting the conservation of the species in any way and the Service has no reasonable basis to believe that it will do so at any point in the foreseeable future. An agency action that does not in any way achieve its stated purpose is plainly arbitrary and capricious. *See Cape Hatteras*, 344 F. Supp. 2d at 123 ("The agency . . . appears to rely on hope. Agencies must rely on facts in the record and its decisions must rationally relate to those facts.").

[79] *Id.* at 31 (ROA. 2022).

F. The Service's use of the ESA to designate speculative, potential habitat is novel and improper, and must be reversed.

The ESA authorizes the Service to designate land "which is *then* considered to be critical habitat"—not land that is *potential* habitat. 16 U.S.C. § 1533(a)(3)(A)(ii) (emphasis added). As to lands that *may* be useful in the conservation of a species *if* they are restored to suitable condition, the ESA provides an alternate provision. After an initial "critical habitat" designation, the Secretary "may, from time-to-time . . . as appropriate, revise such designation." 16 U.S.C. § 1533(a)(3)(A)(ii). As explained in the Final Rule, "[h]abitat is dynamic," and "critical habitat designated at a particular point in time may not include all of the habitat areas that [the Service] may later determine are necessary for the recovery of the species."[80] If potentially useful lands are restored such that they become essential to the conservation of the species, they may be included in a revised designation.

In this case, however, it is clear that the Service is using the ESA for a new and improper purpose. In their briefing before the district court, the Federal Defendants explained the rationale for its designation of Unit 1:

> 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 [the Service's]

[80] Final Rule, 77 Fed. Reg. 35,129 (ROA. 640).

> 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.[81]

The Federal Defendants suggest that this makes sense "as a practical matter,"[82] but the fact remains that the critical habitat provision is plainly unintended and unsuitable for this purpose. As the Service admits, nothing in the ESA or any other law empowers it to actually convert private lands designated as "critical habitat" into suitable habitat for an endangered species.[83] At best, the designation imposes regulatory burdens that likely will frustrate any attempt by the Landowners to put their land in Unit 1 to a more productive economic use. Indeed, the Service's own economic analysis explained that "the only additional conservation effort anticipated to be undertaken incrementally as a result of critical habitat designation for [the] gopher frog is *the avoidance of development in Unit 1*."[84] Recognizing that the statute does not give it the tools to accomplish its goals, the Service is instead using it to impose a stalemate, in which the land will neither contribute to

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[81] Federal Defendants' Cross-Motion for Summary Judgment as to Weyerhauser, at 13 (ROA. 1348).

[82] *Id.*

[83] Recognizing that the ESA provides them with no power to achieve their conservation goals as to Unit 1, the Federal Defendants, in their briefing before the district court, appeared to rely instead on guilt: "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 the frog; rather, their choice simply means that this highly endangered species is that much closer to extinction." *Id.* at 16 (ROA. 1351).

[84] Final Economic Analysis at 5-2 (¶ 112) (AR. 6677) (emphasis added).

the conservation of the dusky gopher frog nor serve the intended uses of its owners.

As explained above, the Service's novel theory of "critical habitat" would allow it to burden vast swathes of private lands across the United States. As it stands to reason that most lands within the United States are currently "unoccupied" by a protected species, such private lands, under the reasoning offered by the Service, become eligible for designation if they could be restored to a suitable habitat for any protected species, regardless of their current or foreseeable use, and regardless of any government authority to cause the restoration to take place. It would indeed become the exception to find lands that would not come within such an encompassing standard, and thus be outside of the Secretary's regulatory reach.

> When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, . . . [courts] typically greet its announcement with a measure of skepticism. [Courts] expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.

Utility Air, 134 S. Ct. at 2444 (quotations omitted). Congress certainly did not "speak clearly" to provide that potential, speculative habitat could be designated as critical habitat, or, in effect, reserved as potential future "backup" habitat, and the very unsuitability of the statute for such a purpose strongly suggests that it was not intended. Although the Service may have other ways to ensure that Unit 1 and

other potentially restorable lands are put to a use that will assist with the conservation of the endangered species,[85] the Service's use of a critical habitat designation for such a purpose is improper and must be reversed.

III. The Service arbitrarily chose not to exclude Unit 1 despite the heavy economic burden on the Landowners and no benefit to the species.

Under the ESA, the Secretary may only designate critical habitat "after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2).

> The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Id.

In this case, Unit 1 was designated as critical habitat because the Service believes it could potentially be restored to suitable habitat that would have value to the species. The unit, however, can only be restored through active land management for recovery purposes, including controlled burns.[86] As the Service

[85] *See*, *e.g.*, 16 U.S.C. § 1534, "Land acquisition." The Federal Defendants' argument before district court, that the Landowners' interpretation of the critical habitat "would leave [the Service] powerless to act where the only remaining habitat essential to the conservation of the species is located on private land," plainly fails to account for other options plainly open to the government. *See* Federal Defendants' Cross-Motion for Summary Judgment as to Markle, at 16-16 (ROA. 1218-19).

[86] Final Rule, 77 Fed. Reg at 35,135 (ROA. 646).

states in the Final Rule, the potential value of Unit 1 to the species would be its potential to create populations that would ward against stochastic events. Under the conditions in Unit 1 that are provided in the Final Rule, Unit 1 currently cannot support dusky gopher frog populations even if a stochastic event were to occur. Therefore, the Service failed in its rule to articulate any biological benefit attributable to the designation of Unit 1 as critical habitat.

By contrast, the Service's economic impact studies have shown that the designation of Unit 1 could cause $33.9 million of losses through foreclosed development potential. Despite these burdensome and significant economic impacts to a small group of landowners, in a conclusory finding without rationale or factual support, the Service found that "economic analysis did not identify any disproportionate costs that are likely to result from the designation."[87] The final Economic Analysis used by the Service in preparing the Final Rule shows no direct benefit to the conservation of the species, except as to the avoidance of development of Unit 1.[88] However, because the designation cannot compel the Landowners to make the changes necessary to make Unit 1 suitable for the frog, it cannot directly benefit the species.

[87] *Id.* at 35,141 (ROA. 652).

[88] The report states that "the only additional conservation effort anticipated to be undertaken incrementally as a result of critical habitat designation for gopher frog is the avoidance of development in Unit 1." Final Economic Analysis at 5-2 (¶ 112) (AR. 6677). "Therefore, ancillary benefits are only anticipated related to the avoidance of development in Unit 1." *Id.*

The economic study did find four general categories of ancillary benefits from the gopher frog designation:

1. Property value benefits: open space or decreased development may increase property values.

2. Aesthetic benefits: including social welfare gains and increased willingness to pay to visit a habitat region.

3. Ecosystem services benefits: Decreased development may lead to protection and improvement of water quality and preservation of natural habitat for other species.

4. Existence value: value held by the public in biodiversity and conservation.

Id. However, neither the economic analysis nor the Service ever provided an explanation of the Secretary's decision that there were no impacts disproportionate to the benefits to the species. Instead, the Secretary seems to assume that these four non-specific categories of benefits, which, in truth, could apply to any designation of land for non-development, outweigh $33.9 million in economic impacts. Such a finding would eviscerate what Congress considered the most important amendment to the ESA.[89]

The district court found that "[c]onsideration of economic impacts" is all that is required under the ESA, and that the Service "fulfilled this statutory

[89] 124 Cong. Rec. H13579-80 (Oct. 14, 1978) (Statement of Rep. John M. Murphy) ("The Secretary is authorized to alter the critical habitat designation based on this economic evaluation. This provision is the most significant provision in the entire bill.").

mandate by identifying baseline economic impacts." [90] Under this standard, or non-standard, the Service would be obligated simply to prepare a report detailing economic impacts without actually identifying whether the benefits were proportional to the costs. That is not what the statute provides. The Secretary may exclude areas from designation for *disproportionate* impacts. Thus, the Secretary must weigh the impacts against the benefits to determine whether the costs of a designation are indeed proportional to its benefits. The district court and Appellees' interpretation would provide for no meaningful scrutiny of the Service's decision, contrary to the language of the ESA. Because the Service failed to articulate reasons for its decision, the rule must be vacated as to Unit 1. As currently framed, the decision is plainly arbitrary.

IV. If the Service's interpretation of "critical habitat" is legitimate, the statute exceeds Congress's powers under the Commerce Clause.

According to the government's position, the ESA permits the Service to designate private property as "critical habitat" on the theory that it *could* serve as a habitat for an endangered species *if* it is actively managed and restored to a suitable condition and *if* the species is later reintroduced to the area—even when the property's owners have not agreed to permit such restoration and reintroduction, and the Service admittedly has no way to compel them to do so. As explained

[90] Order and Reasons at 42 (ROA. 2033).

above, this is beyond the legitimate scope of the statute and must be corrected. However, to the extent that the government's interpretation of the statute is correct, the statute exceeds Congress's power under the Commerce Clause.

In *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 624 (5th Cir. 2003), this Court held that the provision of the ESA prohibiting "takes" of endangered species was within Congress's Commerce Clause power.[91] This Court first explained that under the Commerce Clause, Congress is limited to regulating "the use of the channels of interstate commerce"; "the instrumentalities of interstate commerce"; and "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 628 (quoting *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)). This Court recognized the "critical nature of the interrelationships of plants and animals between themselves and with their environment," as well as the "unknown" and "unforeseeable" effects that the extinction of one species could have on "the chain of life on this planet." *Id.* at 640 (quotations omitted). Accordingly, this Court concluded that "regulated takes under ESA do affect interstate commerce," and that "the link between species loss and a substantial commercial effect is not attenuated." *Id.*

[91] "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

This Court further explained that although "takes" of one particular species may not have a demonstrable or substantial effect on interstate commerce, "takes" of *all* endangered species may be viewed in the aggregate, in which case the required effect on interstate commerce is present. *See GDF*, 326 F.3d at 638-40. This Court first acknowledged that "*de minimis* instances subsumed within a regulatory scheme must be *essential* to that scheme, so that it could be *undercut* without the particular regulation." *Id.* at 640 (citing *Lopez*, 514 U.S. at 561). This Court went on to explain that, due to the "interdependent web of all species," "[a]llowing a particular take to escape regulation because, viewed alone, it does not substantially affect interstate commerce, would undercut the ESA scheme and lead to piece-meal extinctions." *Id.* (quotations omitted). This Court therefore concluded that regulating even intrastate takes of commercially insignificant species is "essential" to the ESA's regulatory scheme. *See id.*

By the same logic, however, regulating Unit 1 and other similarly situated land as "critical habitat" is plainly *not* essential to the ESA's regulatory scheme. There 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 Service itself makes clear in the Final Rule, it has no basis to predict that the habitat in Unit 1 ever will be restored and dusky gopher frogs will be reintroduced

at any time in the foreseeable future—only a "hope."[92] Such an unsupported hope cannot form a rational basis for regulation under the Commerce Clause. *See GDF*, 326 F.3d at 638 ("The *possibility* of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster."); *Lopez*, 514 U.S. at 567 ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.").[93]

More to the point, 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. Once again, Unit 1 consists of privately owned land that is not inhabited or used by the dusky gopher frog, and is of no use whatsoever to the species unless it is actively restored and managed and frogs are reintroduced. Its owners have no intention of creating a suitable habitat and allowing the frogs to be reintroduced, and nothing in the ESA or any other law grants the government the

[92] Final Rule, 77 Fed. Reg. at 35,123 (ROA. 634).

[93] A recent district court opinion affirmed that the provisions of the ESA cannot be applied to purely intrastate activities on private land having only an attenuated effect on interstate commerce. *See 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 Nov. 5, 2014).

power to compel them to do so. Failing to designate such land as "critical habitat" would not undercut the Service's ability to protect the frogs—it would leave the Service and the frogs in exactly the same position where they would be absent the Unit 1 designation.

The district court quoted two statements from the Supreme Court's opinion in *Gonzales v. Raich*, 545 U.S. 1 (2005), and apparently interpreted them to mean that "an individual application of a valid statutory scheme" cannot be challenged as beyond the powers of Congress.[94] *Raich*, 545 U.S. at 17 ("[W]hen 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.") (quotations omitted); *id.* at 23 ("[W]here 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.") (quotation omitted). Apparently finding that "the designation of critical habitat by the Secretary," *in general*, is important in preventing the extinction of endangered species, the district court upheld its application in this case.[95] Similarly, in their briefing before the district court, the Federal Defendants argued that "the Court need only find that Section 4's

[94] *See* Order and Reasons at 26-27 (ROA. 2017-18).

[95] *See id.* at 27 (ROA. 2018).

provision requiring designation of critical habitat is essential to the ESA," because specific applications of the statute are irrelevant to the constitutional analysis.[96]

Both the district court and the Federal Defendants are mistaken: a court may conclude that a statute is constitutional in some applications and unconstitutional in other applications. In *Raich* itself, the plaintiffs challenged the Controlled Substances Act ("CSA") specifically "as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law," despite the fact that such distinctions are not found in the CSA. *See Raich*, 545 U.S. at 15. The Court acknowledged at the beginning of its discussion that the plaintiffs did not challenge the CSA itself, or "any provision or section of the CSA," as unconstitutional. *Id.* Nevertheless, the Court went on to consider whether the specific challenged applications were essential to the CSA's regulatory scheme. *See id.* at 22 ("[W]e have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would *leave a gaping hole in the CSA*.") (emphasis added); *id.* at 24-25 (The classification of marijuana in the CSA "was merely one of many '*essential* part[s] of a larger regulation of economic activity, in which the regulatory scheme

[96] *See* Federal Defendants' Cross-Motion for Summary Judgment as to Weyerhauser, at 22 (ROA. 1357); *see also id.* at 22-23 (ROA. 1357-58) ("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 under the Commerce Clause.").

could be *undercut* unless the intrastate activity were regulated.'") (quoting *Lopez*, 514 U.S. at 561) (emphasis added).

As demonstrated by the Supreme Court's opinions in *Lopez* and *Raich* and this Court's opinion in *GDF*, the district court erred by prematurely ending its analysis and considering only whether the "critical habitat" provision is a facially valid exercise of Congress's Commerce Clause powers. The Federal Defendants argued before the district court that "[t]here is no requirement that every individual application of the ESA Section 4 affect biodiversity or interstate commerce more generally to be upheld as constitutional,"[97] but this argument omits a critical qualification. When, as in this case, the conduct Congress seeks to regulate is purely intrastate and does not in itself substantially affect interstate commerce, it cannot be swept up into a comprehensive regulation of interstate commerce as a "trivial, individual instance" without further analysis. Rather, a court must consider whether the inability to regulate that conduct, and other similar conduct, would undercut or frustrate the purposes of the overall statutory scheme.[98]

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[97] *Id.* at 23 (ROA. 1358).

[98] The point is further supported by *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012). There, Chief Justice Roberts noted that the Commerce Clause power reaches its limit when it "does not regulate existing commercial activity", but instead compels individuals to "*become* active." *Id.* at 2587. (emphasis in original). Here, it is the inaction of the Landowners to create and then preserve habitat that could have a putative effect on interstate commerce (defined as preserving a protected species). But, as Chief Justice Roberts warned: "[a]llowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope

Although this Court concluded in *GDF*, 326 F.3d at 640-41, that the ESA's "take" provision, as applied to six specific species, is within Congress's Commerce Clause power, this Court has yet to consider the constitutionality of the "critical habitat" provisions. The Landowners acknowledge that, properly limited and confined to the statutory definition, the "critical habitat" provisions of the ESA are indeed within the legitimate powers of Congress. As explained above, however, the Service's designation of Unit 1 as "critical habitat"—land that, by all accounts, will not contribute to the conservation of the dusky gopher frog absent a speculative series of events that almost certainly will not occur—is improper as a matter of statutory interpretation. However, even if this Court finds the Service's interpretation of the statute to be legitimate, the statute would be stretched beyond the limits of the Commerce Clause power and would be unconstitutional as applied to Unit 1 and other similarly situated land.

V. The Service failed to prepare an Environmental Impact Statement, which was required under the National Environmental Policy Act because the Service's designation of Unit 1 contemplated major physical modifications significantly affecting the quality of the environment.

NEPA requires federal agencies to examine the environmental effects of proposed federal actions and to inform the public of the environmental concerns that went into the agency's decision-making. 42 U.S.C. § 4332(2)(C). More

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of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him." *Id.*

specifically NEPA requires the Service to prepare an Environmental Impact Statement for major actions "significantly affecting the quality of the human environment." *Id.* In the Final Rule, the Service stated that NEPA was not required for critical habitat designations, and Appellees also have stated that the rule does not provide for physical modifications to the environment of Unit 1. Both arguments are without merit.

First, the ESA does not fully satisfy the protections created by NEPA, and so cannot displace those protections. The Tenth Circuit in *Catron County Bd. of Comm'rs v. F.W.S.*, 75 F.3d 1429, 1436-39 (10th Cir. 1996), held that critical habitat designations that implicate changes to the physical environment do trigger NEPA protections. There, as here, the Government argued that NEPA does not apply because the ESA offers sufficient protections through its statutory scheme. The Tenth Circuit disagreed because partial fulfillment of NEPA's requirements is not enough; the Act's plain language makes clear that federal agencies must comply "to the fullest extent possible." *Id.* at 1437.

Second, the designation of Unit 1, if Unit 1 ever were to be converted to habitat, would call for changes to the physical environment. As the Intervenor Defendants admit, "fire is the only known management tool that will maintain the existing breeding pond as suitable habitat," and "human intervention will likely be

required to restore the uplands of Unit 1."[99] The Final Rule designated Unit 1 for the purpose of restoring the land through activities like controlled burning so that the dusky gopher frog may then be *brought* to Unit 1. The Service admitted in the Rule that Unit 1 was the only unsuitable habitat designated as critical habitat, but that it was "restorable with reasonable effort."[100] That effort includes "habitat management [such as] prescribed burning, or frog translocation."[101] Either the Final Rule requires physical modifications to Unit 1 triggering NEPA's Environmental Impact Statement requirement, or the unit will remain unsuitable for the purpose provided as the basis for its designation in the Rule, in which case the rule is arbitrary and the designation provides no benefit whatsoever to outweigh the $33.9 million in economic impacts. Under either interpretation, the designation of Unit 1 as critical habitat must be set aside.

CONCLUSION

For the foregoing reasons, the Landowners respectfully request that this Court reverse the district court and render judgment in their favor.

[99] Intervenor Defendants' Response to Weyerhauser's Statement of Uncontested Material Facts at 4-5 (ROA. 1499-1500).

[100] Final Rule, 77 Fed. Reg. at 35,135 (ROA. 646).

[101] *Id.* at 35,123 (ROA. 634).

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. Proc. 32(a)(7) and 5th Cir. R. 32.3, the undersigned counsel certifies that this brief complies with the type-volume and typeface requirements of this Court. Specifically,

1. Exclusive of the portions exempted by the Fed. R. App. Proc. 32(a)(7)(iii) and 5th Cir. R. 32.2, this brief contains 12,953 words on 1,161 lines over 54 pages printed in proportionally spaced typeface.
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