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

and

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,
Defendant Intervenor-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; SALLY JEWELL, in her official capacity as Secretary of the Department of Interior,
Defendants-Appellees

and

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,
Defendant Intervenor-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
SECTION "F," HONORABLE MARTIN L.C. FELDMAN, PRESIDING

BRIEF OF DEFENDANT INTERVENOR-APPELLEES

Collette Adkins Giese
Center for Biological Diversity
P.O. Box 339
Circle Pines, MN 55014-0339
Telephone: 651-955-3821
Facsimile: (415) 436-9683
cadkinsgiese@biologicaldiversity.org

John Buse
Center for Biological Diversity
351 California Street, Suite 600
San Francisco, CA 94104
Telephone: (415) 436-9682
Facsimile: (415) 436-9683
jbuse@biologicaldiversity.org

Attorneys for Defendant Intervenor-Appellees

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so 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

Counsel for Appellants
Richard C. Stanley
STANLEY, REUTER, ROSS, THORNTON & ALFORD, LLC
909 Poydras Street, Suite 2500
New Orleans, LA 70112
Telephone: 504-523-1580
Facsimile: 504-524-0069

M. Reed Hopper
PACIFIC LEGAL FOUNDATION
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
mrh@pacificlegal.org

Edward Poitevent, II
1 Lakeway Plaza, Suite 1200
Metairie, LA 70002
Telephone: (504) 648-4109

Appellees
United States Fish and Wildlife Service; Daniel M. Ashe; United States Department of Interior; Kenneth Salazar; and Sally Jewell

Appellees' Counsel
David C. Shilton
U.S. DEPARTMENT OF JUSTICE
Ben Franklin Station
P.O. Box 7611
Washington, D.C. 20044-7611
Telephone: (202) 305-0324
Fax: (202) 305-0275
david.shilton@usdoj.gov

Defendant Intervenor-Appellees
Center for Biological Diversity; Gulf Restoration Network

Entities with an interest
None

Defendant Intervenor-Appellees' Counsel

Collette Adkins Giese
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 339
Circle Pines, MN 55014-0339
Telephone: 651-955-3821
Facsimile: (415) 436-9683
cadkinsgiese@biologicaldiversity.org

John Buse
CENTER FOR BIOLOGICAL DIVERSITY
351 California Street, Suite 600
San Francisco, CA 94104
Telephone: (415) 436-9682
Facsimile: (415) 436-9683
jbuse@biologicaldiversity.org

Amici Curiae
American Farm Bureau Federation; National Alliance of Forest Owners; National Association of Home Builders

Attorneys for Amici Curiae:
Paul Korman

Joseph B. Nelson
Tyson C. Kade
Van Ness Feldman, LLP
1050 Thomas Jefferson Street, NW
Washington, DC 20007
Telephone: (202) 298-1800
pik@vnf.com

/s/ Collette Adkins Giese
Collette Adkins Giese

Attorney for Defendant Intervenor-Appellees

REQUEST FOR ORAL ARGUMENT

Defendant Intervenor-Appellees, Center for Biological Diversity and Gulf Restoration Network, request oral argument. This appeal presents significant legal issues of first impression in the Fifth Circuit regarding interpretation of the Endangered Species Act. Intervenor Defendant-Appellees respectfully suggest that oral argument may assist the Court in resolving these issues.

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STATEMENT OF THE ISSUES

I. Under the Endangered Species Act ("ESA"), the U.S. Fish and Wildlife Service ("FWS") "shall designate" specific areas unoccupied by an endangered species as "critical habitat" if the agency determines that "such areas are essential for the conservation of the species." 16 U.S.C. §§ 1532(5)(A)(ii), 1533(b)(2). FWS found Unit 1 essential to the dusky gopher frog because "it provides important breeding sites for recovery [and] includes habitat for population expansion outside of the core population areas in Mississippi, a necessary component of recovery efforts for the dusky gopher frog." 77 Fed. Reg. 35,118, 35,135 (June 12, 2012). Did the district court correctly hold that FWS reasonably designated Unit 1?

II. The ESA requires FWS to "tak[e] into consideration the economic impact" of the designation. 16 U.S.C. § 1533(b)(2). FWS prepared an Economic Analysis that considers the economic impacts to the Landowners and, exercising its discretion, did not exclude Unit 1. 77 Fed. Reg. at 35,140-35,141; AR 6617 (Economic Analysis). Did the district court correctly hold that FWS complied with the ESA by considering the economic impacts?

III. The Fifth Circuit and five other appellate courts found substantial aggregate effects on interstate commerce from protection of endangered species, including isolated intrastate species with little or no commercial value. *See, e.g.*, *GDF Realty Inv., Ltd. v. Norton*, 326 F.3d 622, 639-41 (5th Cir. 2003) (subterranean invertebrate endangered species found only in Texas). The dusky gopher frog is an endangered species historically found across three states with designated critical habitat in two states, and people travel across state lines to view the frog and its habitat. Did the district court correctly hold that the ESA is a constitutional exercise of congressional authority under the Commerce Clause?

IV. The National Environmental Policy Act ("NEPA") does not apply to actions that do not cause a change to the physical environment. *Metro. Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 744 (1983); *Sabine River Auth. v. U.S. Dep't of Interior,* 951 F.2d 669, 680 (5th Cir. 1992). Designation of Unit 1 will not directly result in any change to the physical environment because FWS cannot force the landowners to take any action to modify this private land. Did the district court (and FWS) properly conclude that NEPA does not apply?

STATEMENT OF THE CASE

Natural History of the Dusky Gopher Frog

The dusky gopher frog (*Rana sevosa*) is a darkly-colored, moderately-sized frog with warts covering its back and dusky spots on its belly. 66 Fed. Reg. 62,993 (Dec. 4, 2001). It lives underground in pine forests (historically those dominated by longleaf pine) and breeds in small ephemeral ponds that lack fish. *Id*. at 62,994.

The dusky gopher frog is currently known from only three sites in Harrison and Jackson counties in southern Mississippi, with only one of these sites regularly showing reproduction by the frog. 77 Fed. Reg. at 35,136. Less than 100 adult dusky gopher frogs likely remain. AR 963; AR 1027. The frog is primarily threatened by habitat loss and disease. 66 Fed. Reg. at 62,997-63,000. Due to its small numbers, it is also highly susceptible to genetic isolation, inbreeding, and random demographic or human related events. *Id*. at 62,999.

Protection of the Dusky Gopher Frog under the Endangered Species Act

The ESA requires FWS "to the maximum extent prudent and determinable" to designate critical habitat for listed species. *Id*. §§ 1533(a)(3), (b)(6)(C); 50 C.F.R. § 424.12. Critical habitat is defined as those "specific areas within the geographical areas occupied by the species, at the time it is listed … on which are found those physical or biological features [that are] (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). FWS must also designate "specific areas outside of 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." 16 U.S.C. § 1532(5)(A)(ii).

In response to litigation from the Center for Biological Diversity, FWS listed the dusky gopher frog (then known as the Mississippi gopher frog) as an endangered species in December of 2001. 66 Fed. Reg. 62,993. Years later, in 2010, the Center's litigation prompted FWS to propose to designate 1,957 acres of critical habitat for the frog. 75 Fed. Reg. 31,387 (June 3, 2010). Based on the best available scientific data on the frog's biological needs, 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. *Id.* at 31,404; *see also* 77 Fed. Reg. at 35,121 (description of PCEs in Final Rule).

The 2010 proposed rule was subjected to public comment and peer review by frog experts. Every peer reviewer concluded that amount of habitat proposed in the 2010 rule was insufficient for the conservation of the species, with several suggesting that FWS consider other locations within the frog's historical range. 76 Fed. Reg. 59,774, 59,776 (Sept. 27, 2011); *see, e.g.*, AR 1568 (comments from Joseph Pechmann, Associate Professor, Western Carolina University, who is an

expert on the dusky gopher frog, explaining: "I believe that it 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.").[1] In response to comments from the peer reviewers and others, including the Intervenor Defendants, FWS revised the proposed critical habitat designation to include an unoccupied area in Louisiana. 76 Fed. Reg. 59,774; 77 Fed. Reg. 2254, 2255 (Jan. 17, 2012).

On June 12, 2012, FWS issued its Final Rule designating critical habitat for the frog. 77 Fed. Reg. 35,118. That rule designates approximately 1,544 acres in St. Tammany Parish, Louisiana ("Unit 1"), and approximately 4,933 acres in Forrest, Harrison, Jackson, and Perry counties, Mississippi. In total, approximately

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[1] *See also* AR 1538 (comments from Mike Lannoo, Professor, Indiana University, an expert on amphibian declines who has experience with closely related crawfish frogs, recommending that FWS consider "additional Units in Louisiana and Alabama"); AR 1539, 1541, 1582 (comments from Stephen Richter, Professor, Eastern Kentucky University, an expert on a closely related gopher frog, applauding "the proactive designation of multiple areas currently unoccupied by the species but that represent promising sites for reintroductions to what appear to be historic breeding ponds and surrounding uplands," explaining that these "truly are essential to the conservation of the species," and recommending that FWS "consider sites in these states [Louisiana and Alabama]."); AR 1585 (comments from William Blihovde, an experienced dusky gopher frog scientist, explaining that "it is imperative that this species be established in additional ponds . . . [W]ithout other well-established breeding ponds the [frog] will be at risk of being [wiped] out by a natural disaster, drought, or relatively newly discovered fungi that have been devastating to juvenile amphibians."); AR 1588 (comments from Dr. Pechmann: "I was very pleased to see that the Service designated critical habitat in Louisiana in the revised proposed rule. . . . 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 [drought or disease], and provide for the species' eventual recovery. . . . The critical habitat proposed in Unit 1 contains the best gopher frog habitat remaining in Louisiana, to my knowledge, and some of the best breeding ponds available anywhere in the historical range of *R. sevosa*. <u>I strongly agree with the Service's determination that this area is essential for the conservation of *R. sevosa*.</u>") (emphasis added).

6,477 acres are designated as critical habitat for the dusky gopher frog, all within its historic range. *Id*.

FWS found that Unit 1 is essential for the conservation of the frog:

> Unit 1 consists of five ponds (ephemeral wetland habitat) and their associated uplands. If dusky gopher frogs are translocated to the site, the five ponds are in close enough proximity to each other that adult frogs could move between them and create a metapopulation, which increases the chances of the long-term survival of the population. Although the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species is at high risk of extirpation from stochastic events, such as disease or drought. 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. Therefore, we have determined this unit is essential for the conservation of the species because it provides important breeding sites for recovery. It includes habitat for population expansion outside of the core population areas in Mississippi, a necessary component of recovery efforts for the dusky gopher frog.

Id. at 35,135; *see also id*. at 35,121 (similar).

When promulgating a final rule designating critical habitat for a listed species, FWS must "tak[e] into consideration the economic impact . . . and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). FWS analyzed the economic impact of the final critical habitat designation with three potential scenarios: 1) any development occurring in Unit 1 avoids impacts to jurisdictional wetlands and does not trigger Section 7

consultation,[2] and thereby does not result in any incremental economic impact; 2) development occurring in Unit 1 requires a permit from the U.S. Army Corps of Engineers due to potential impacts to jurisdictional wetlands and triggers consultation; FWS works with the landowners to keep 40 percent of the unit for development and 60 percent managed for the frog, which results in $20.4 million in incremental economic impacts; and 3) development requires a federal permit triggering consultation and FWS determines that no development can occur, resulting in $33.9 million in incremental economic impacts. AR 6625-26 (Economic Analysis). After considering the uncertainty of any potential economic impacts, 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.

The District Court Upholds the Critical Habitat Designation in its Entirety

Markle Interests, L.L.C.; P&F Lumber Company 2000, L.L.C.; PF Monroe Properties, L.L.C; and Weyerhaeuser Company (the "Landowners") filed three separate lawsuits challenging the frog's critical habitat designation on statutory and constitutional grounds; these lawsuits were consolidated before the district court.

[2] To fulfill its substantive purposes, the ESA establishes an interagency consultation process whereby a federal agency is required to consult with FWS 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 adverse modification of habitat of such species . . . determined . . . to be critical . . . ." 16 U.S.C. § 1536(a)(2) (Section 7 consultation); 50 C.F.R. § 402.14 (Formal Consultation).

The district court granted leave to intervene, of right, to the Center for Biological Diversity and Gulf Restoration Network. The parties filed cross motions for summary judgment.

On August 22, 2014, in its "Order and Reasons" (hereinafter "Order"), the district court upheld the critical habitat designation in its entirety and granted in part the cross-motions for summary judgment filed by the U.S. Fish and Wildlife 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 "FWS"), and by the Center for Biological Diversity and the Gulf Restoration Network (the "Center" or "Intervenor Defendants").[3]

The district court rejected all the Landowners' arguments concerning whether FWS's designation of Unit 1 satisfies the ESA's requirements. The district court found that FWS's determination that Unit 1 is "essential" for the frog is "reasonable and, therefore, entitled to *Chevron* deference." Order at 29. Specifically, "FWS's finding that the unique ponds located on unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA . . . ." *Id.* at 32. As for the requirement that FWS consider the economic impacts of the designation, the

[3] ROA. 1992-2040.

district court found that "FWS endeavored to consider any economic impacts that could be attributable to the designation, and that . . . FWS fulfilled its statutory obligation." *Id.* at 41.

The district court held that the National Environmental Policy Act does not apply to the frog's critical habitat designation because the designation "does not effect changes to the physical environment." *Id.* at 47. The court explained that the Fifth Circuit agrees that "NEPA itself provides, in no uncertain terms, that alteration of the physical environment is a prerequisite for NEPA application . . . ." *Id.* at 48.

Finally, the district court held that the Landowners' constitutional claim is "foreclosed by binding precedent" because six circuits, including the Fifth Circuit, have rejected post-*Lopez* Commerce Clause challenges to applications of the ESA. *Id.* at 24. These cases hold that "the extinction of a species and the resulting decline in biodiversity will have a predictable and significant effect on interstate commerce." *Id.* at 27.

The Landowners timely filed separate Notices of Appeal upon entry of the Judgments and the district court's Order. This Court consolidated the appeals by order dated September 10, 2014.

SUMMARY OF ARGUMENT

The Court should affirm the district court and reject the Landowners' arguments that FWS illegally designated Unit 1 in Louisiana as critical habitat for the dusky gopher frog. Dusky gopher frog experts at the U.S. Fish and Wildlife Service ("FWS") and outside the agency reasonably came to the unanimous conclusion that Unit 1 must be designated as critical habitat to conserve the frog and to fulfill the requirements of the law.

The Endangered Species Act ("ESA") provides that FWS "shall designate" specific areas unoccupied by an endangered species as "critical habitat" if the agency determines that "such areas are essential for the conservation of the species." 16 U.S.C. §§ 1532(5)(A)(ii), 1533(b)(2). As the FWS found, Unit 1 is "essential" for frog conservation because it contains the "best gopher frog habitat remaining in Louisiana," "important breeding sites for recovery," and "habitat for population expansion outside of the core population areas in Mississippi, a necessary component of recovery efforts for the dusky gopher frog." 77 Fed. Reg. 35,118, 35,135 (June 12, 2012); *see* AR 1588.

The Landowners argue that Unit 1 cannot be lawfully designated because the Landowners refuse to cooperate in frog recovery. But the Landowners' unwillingness to conserve the frog provides no basis for setting aside the critical habitat designation. Nothing in the ESA requires that unoccupied critical habitat be

utilized for frog conservation "now" or in the "foreseeable future." These arguments are based on the Landowners' unreasonable interpretations of the ESA that invent requirements not found in the statute's plain language. Other than their own self-serving comments, the Landowners cannot point to a single document – out of the hundreds in the record – that contradicts the experts' finding that Unit 1 is essential. No more is required for the designation to fulfill the ESA's substantive requirements. Thus, the Court should affirm the district court's conclusion that FWS reasonably designated Unit 1 as unoccupied critical habitat.

The Landowners' complaints about FWS's economic analysis also miss the mark. At bottom, the Landowners believe that their economic interests in Unit 1 outweigh the benefits for the frog. Yet even if that were true (which it is not), FWS did the requisite Economic Analysis, and nothing in the ESA requires FWS to exclude lands from the critical habitat designation for economic considerations. To be sure, every court that has examined the issue has found that the agency's decision not to exclude land is committed to agency discretion and unreviewable.

Nor has any court ever found that an agency rule promulgated under the ESA exceeded authority under the Commerce Clause. That argument has already been rejected by six different circuits – including the Fifth Circuit. *See GDF Realty Inv., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003) *reh'g denied*, 362 F.3d 286 (5th Cir. 2004) (en banc), *cert. denied*, 545 U.S. 1114 (2005). The Landowners' novel

arguments to the contrary must be rejected.

The Landowners' additional arguments that FWS should have done an environmental review under NEPA must also be rejected. The U.S. Supreme Court and the Fifth Circuit hold that NEPA does not apply to actions that do not cause a change to the physical environment. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983); *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 680 (5th Cir. 1992). As the district court found, the record here makes clear that no change to the physical environment will occur as a direct result of the critical habitat designation.

For all these reasons, and as further explained below, the Center asks that the Court affirm the district court.

ARGUMENT

I. THE CRITICAL HABITAT DESIGNATION SATISFIES THE ESA'S SUBSTANTIVE REQUIREMENTS

The critical habitat designation complies with the ESA's substantive requirements and is based on the expertise of agency biologists with input from other frog experts who reasonably determined that protection of Unit 1 in Louisiana is essential to conserve the frog.

FWS must designate unoccupied areas "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). The district court analyzed the record and found adequate support for FWS's finding that Unit 1 is essential for conservation of the dusky gopher frog. Order at 29-33. Seeking reversal of the district court, the Landowners ask this Court to supersede the agency's expert determination and adopt the Landowners' self-serving position on what the frog needs to survive and recover.

The ESA does not define "essential," but rather FWS uses its expertise to make that determination on a case-by-case basis. Here, FWS found that maintaining the five ponds found on Unit 1 would provide habitat into which dusky gopher frogs could be translocated, which is essential to decrease the risk of extinction of the species and provide for the species' eventual recovery. 77 Fed. Reg. at 35,135. Specifically, FWS found that the dusky gopher frog "is at high risk

of extirpation from stochastic events, such as disease or drought, and from demographic factors such as inbreeding depression" and that "establishment of additional populations beyond the single site known to be occupied at listing is critical to protect the species from extinction and provide for the species' eventual recovery." *Id.* at 35,121. Therefore, FWS concluded that Unit 1 is "essential for the conservation of the species" because it "provides important breeding sites for recovery" and "includes habitat for population expansion outside of the core population areas in Mississippi, a necessary component of recovery efforts for the dusky gopher frog." *Id.* at 35,135.

Contrary to the argument of the Amici Curiae, the agency explicitly found that a designation limited to occupied habitat would be inadequate. *Id.* at 35,123 ("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.").[4] Amici Curiae further argue that FWS failed to find that the "whole area" comprising Unit 1 is essential to the frog. Yet the agency reasonably delineated boundaries of Unit 1 by buffering the historic breeding sites by a radius of 621 meters because "the area created will protect the

[4] *See also* 77 Fed. Reg. at 35,121 ("The establishment of additional populations beyond the single site known to be occupied at listing is critical to protect the species from extinction and provide for the species' eventual recovery.").

majority of a dusky gopher frog population's breeding and upland habitat." *Id.* at 35,134. The agency chose this radius by using the "median farthest distance movement . . . from data collected during multiple studies of the gopher frog group" and adding 50 meters to this distance "to minimize the edge effects of the surrounding land use." *Id.*; *see also id.* at 35,124 ("Based on the best scientific information available to the Service, 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 dusky gopher frog."); *Id.* at 35,132 ("We have determined that all areas designated as critical habitat outside the area occupied by the species at the time of listing are essential for the conservation of the species.") (emphasis added).

FWS's finding that Unit 1 is essential is supported by frog experts outside the agency who reviewed the proposed critical habitat designation. For example, Dr. Joseph Pechmann from Western Carolina University, who has done extensive research on the dusky gopher frog, explained in his comments on the proposed rule: "I believe that it 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." AR 1568; *see also* AR 1588 ("I strongly agree with the Service's determination that this area is essential for the conservation of *R. sevosa*."). He identified the area where the frog was last documented in Louisiana (which FWS ultimately designated as Unit 1) and

explained that it "retains the required characteristics necessary to serve as a breeding pond . . . ." AR 1568.

The Landowners are wrong to argue that the designation lacks "some logical connection to the conservation of the species." Appellants' Joint Brief at 28. FWS reasonably relied upon the expertise of their own biologists and experts outside the agency in determining that designation of Unit 1 is "essential." When an agency is acting within its expertise to make a scientific determination "a reviewing court must generally be at its most deferential." *Balt. Gas & Elec. Co. v. Nat'l Res. Def. Council*, 462 U.S. 87, 103 (1983). FWS made the requisite determination that the designated unoccupied area is essential to the conservation of the species, and the Court must defer to this scientific determination made within the scope of the agency's expertise. And once the agency determines that an area is essential, the ESA requires that the agency designate it as critical habitat.

The Landowners argue that under FWS's reasoning, "much of the land in the United States" – even developed areas like "buildings" and "pavement" – could be found essential and designated as critical habitat. Appellants' Joint Brief at 30, 32. But the Landowners' "slippery slope" arguments are easily disregarded. No one is arguing that FWS has unfettered discretion to designate critical habitat. The ESA limits the designation of unoccupied areas to those that are "essential," and if the agency's decision lacks support in the record, the designation would be

appropriately set aside by the courts. But that is not the situation here. Here, based on the scientific expertise of its own agency biologists and frog specialists outside of the agency, FWS concluded that Unit 1 is "essential for the conservation of the species because it provides important breeding sites for recovery" and "includes habitat for population expansion outside of the core population areas in Mississippi, a necessary component of recovery efforts for the dusky gopher frog." 77 Fed. Reg. at 35,135; *see, e.g.*, AR 1588 ("I strongly agree with the Service's determination that this area is essential for the conservation of *R. sevosa*.").

The Landowners emphasize language from a case describing the standard for designation of unoccupied lands as more "onerous" than that for occupied lands. *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2009). FWS met this rigorous standard by making the requisite finding that unoccupied "specific areas" are "essential" for the conservation of the frog – a requirement that does not exist in the standard for occupied lands (because the standard for occupied lands focuses on presence of essential "features" rather than the importance of the entire "area").[5] The fact that Unit 1 meets the standard for unoccupied lands but

[5] In defining critical habitat, the ESA differentiates between geographical areas that are occupied and unoccupied by the species at the time of listing. For areas that are occupied, critical habitat is limited to those areas containing "physical or biological features (I) essential to the conservation of the species and (II) which may require special management consideration or protection." 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Thus, for occupied areas to be designated as critical habitat, the features identified as essential by FWS must be present at the time of designation. In contrast to occupied habitat, the plain language of the ESA shows that the essential features need not be present. That is because for unoccupied habitat the ESA's focus is on the areas and not the

does not meet the standard for occupied lands is in no way fatal to the designation.

The Landowners further argue that FWS's interpretation of "essential" is too expansive and that unoccupied land must "currently" or in the "foreseeable future" support the conservation of the species. Appellants' Joint Brief at 34. But the Landowners are imposing an additional requirement not found in the plain language of the ESA. Similarly, Amici Curiae rely on a single statement in the ESA's legislative history suggesting that critical habitat be limited to the area in which the species would "naturally expand." Brief of Amici Curiae at 18. But the comments of one senator in the legislative history cannot impose a requirement not found anywhere in the statute. *See, e.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.").

Nor does the "Critical Habitat Memorandum" relied upon by Amici Curiae impose that requirement. That policy document drafted by the agency merely provides that "typically" (in other words, not always) "unoccupied areas should have significant potential for re-occupation." Memorandum from Kenneth Stansell, Acting Deputy Director, FWS to Regional Director, Regions 1, 2, 3, 4, 5, 6, and 7 and California Nevada Operations Office Manager (Dec. 19, 2006) ("Critical Habitat Memorandum") at 8 (emphasis added). In that same paragraph, the

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features: the ESA requires that FWS find that "such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii) (emphasis added).

Memorandum provides that the agency should designate "areas that are geographically separated from other critical habitat units (e.g., in a separate watershed for stream units), to provide redundancy in the event of natural catastrophe." *Id*. Given that this is one of the primary justifications that FWS used in designating Unit 1, this Memorandum supports the agency's designation of Unit 1. *See* 77 Fed. Reg. at 35,125 ("Critical habitat will support recovery of the dusky gopher frog by protecting sites across a large area of the species' historic range and providing space for population expansion, including in areas that will provide protection from the effects of local catastrophic events.").

Moreover, nothing in the ESA or its legislative history requires that the landowners be willing to help save the animal. As such, the Landowners' refusal to participate in frog recovery cannot be used to avoid the designation or somehow negate the experts' conclusions that Unit 1 is essential. The ESA is effective at saving endangered species precisely because of the strong legal protections that it imposes (such as the interagency consultation requirement for federal actions that may adversely impact designated critical habitat). If the Act's protections could be trumped anytime a landowner objects, its effectiveness would be eviscerated.

The Landowners argue that the agency, in the future, could have revised the designation if the owners would later decide to cooperate in frog recovery. However, this argument misses the point. Unit 1 is now essential for the frog. As

such, FWS was legally required to now designate Unit 1 as critical habitat. Logically, Unit 1 can be essential for the frog even though the frog cannot now occupy the land. As a rough analogy, consider that food is no less essential when the person is starving.

In addition, contrary to the Landowners' arguments, FWS has a "reasonable basis" to believe that Unit 1 could support the frogs in the "foreseeable future." Appellants' Joint Brief at 37. As FWS explained, the agency anticipates working with the Landowners to conserve the frog:

> 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. According to the landowners, the timber lease on their property does not expire until 2043. The Service has a number of tools, such as habitat conservation plans, that could be used to formalize the timber management goals of the landowners and work towards recovery of the dusky gopher frog. There are also programs, such as the Healthy Forests Initiative administered through the U.S. Department of Agriculture's Natural Resources Conservation Service, that provide funding to private landowners for habitat management. However, these tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner.

77 Fed. Reg. at 35,123. Although the Landowners have thus far refused cooperate in frog recovery, the agency could reasonably anticipate that the Landowners would work cooperatively in the future (if the critical habitat designation is

upheld). Such cooperation would benefit the frogs while still allowing the Landowners to utilize the land for timber operations. *See id*. Moreover, the ownership of Unit 1 could change in the future, and the frog might benefit from different owners that would embrace the opportunity to save this animal from the brink of extinction.

The purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species . . . ." 16 U.S.C. § 1531(b). FWS could not effectively conserve endangered species and the ecosystems on which they depend if the agency could not try to protect essential areas that landowners are not willing to voluntarily conserve. In the case of the gopher frog, its population is on the brink of extinction precisely because so little of its habitat remains. 66 Fed. Reg. at 62,997-98. FWS reasonably concluded that the private land on Unit 1 is essential because the frog could not survive and recover if limited to the few remaining occupied areas. 77 Fed. Reg. at 35,135. Undoubtedly, this is why the ESA provides for the designation of unoccupied critical habitat.

On the law and facts, the Landowners have failed to demonstrate that FWS's designation of Unit 1 was arbitrary, capricious, or contrary to the requirements of the ESA. The Court should affirm the district court.

II. FWS REASONABLY EXERCISED ITS DISCRETION TO NOT EXCLUDE UNIT 1 BASED ON A CONSIDERATION OF ECONOMIC IMPACTS

The Landowners contend that FWS must weigh the economic impacts of the critical habitat designation against its benefits. But as the district court correctly held, "[t]he ESA only requires that the Service consider all potential costs, which it has done." Order at 44, n.34. For that reason, as explained below, FWS was not required to conduct any such balancing to comply with the ESA, and the agency reasonably exercised its discretion to not exclude Unit 1.

The economic analysis required under ESA Section 4(b)(2) consists of two components: (1) an initial, mandatory requirement that FWS "tak[e] into consideration the economic impact" of the designation; and (2) a wholly discretionary process wherein FWS, informed by those considerations, "may exclude any area from critical habitat if [FWS] 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) (emphasis added).

The ESA requires a balancing of the benefits of exclusion versus inclusion only when the agency chooses to exclude an area (and not when it chooses to not exclude an area). *Id.*; *see Alaska Oil & Gas Ass'n v. Salazar*, 916 F. Supp. 2d 974, 994 (D. Alaska 2013) ("The need to balance the benefits of exclusion versus inclusion arises only when the Service decides to exclude an area, not include

one."). As such, the Landowners are wrong to fault FWS for failing to explicitly balance the benefits of exclusion versus inclusion.

The Landowners further challenge FWS's conclusion that the "economic analysis did not identify any disproportionate costs that are likely to result from the designation." 77 Fed. Reg. at 35,141. Specifically, the Landowners argue that FWS failed to sufficiently explain its decision that there were no disproportionate impacts. Yet FWS's decision is reasonably based on its economic analysis, which did not find that the Unit 1 landowners would necessarily suffer $34 million in economic impacts. That figure comes from Scenario 3, the "worst case scenario," where all development includes a federal nexus and FWS recommends no development. AR 6625-26 (Economic Analysis). Yet under Scenario 1, development would avoid jurisdictional wetlands, which would not trigger consultation and would result in no economic impacts to the landowners. AR 6625, 6663 (Economic Analysis). Given the uncertainty surrounding potential economic impacts and the importance of Unit 1 to the conservation of the gopher frog, FWS reasonably concluded – based on its economic analysis – that the Final Rule does not result in "any disproportionate costs." 77 Fed. Reg. at 35,140-41 (discussing why the agency did not exercise its discretion to exclude lands based on economic impacts); *Id.* at 35,124 (explaining why "the Service believes Unit 1 is essential to the conservation of the dusky gopher frog"); *see Cape Hatteras Access Pres.*

Alliance v. U. S. Dep't of Interior, 731 F. Supp. 2d 15, 29 n.3 (D.D.C. 2010) (upholding a similar economic analysis). No more explanation is required. The district court properly viewed FWS's decision in light of the deference afforded agency decisions. Order at 44 (citing *Luminant Generation Co. LLC v. U.S. Envtl. Prot. Agency*, 714 F.3d 841, 850 (5th Cir. 2013) ("If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld.")). For this same reason, this Court should uphold FWS's determination.

Moreover, the decision not to exclude particular areas from a critical habitat designation is not the proper subject of judicial review under the Administrative Procedure Act ("APA"). The APA does not apply to agency action "to the extent that . . . agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). 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." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). In this case, while Congress provided a standard for assessing a decision to exclude an area, 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. 16 U.S.C. § 1533(b)(2). Thus, the Landowners cannot state a claim under the APA because the challenged agency action – the decision

not to exclude Unit 1 – is committed to agency discretion by law. Indeed, numerous courts have held that decisions not to exclude areas under Section 4(b)(2) are committed to agency discretion and therefore unreviewable.[6]

III. THE ESA IS A CONSTITUTIONAL EXERCISE OF CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE

Six federal courts of appeals (the District of Columbia, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits) concluded that Congress's protection of endangered species – including isolated intrastate species with little or no commercial value – under the ESA falls within the authority of the Commerce Clause.[7] The Landowners argue that FWS has "no basis to predict that the habitat in Unit 1 ever

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[6] In *Cape Hatteras*, 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." 731 F. Supp. 2d at 28-29; *see also Bldg. Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce,* No 11-4118, 2012 U.S. Dist LEXIS 170688, at *19 (N.D. Cal. Nov. 30, 2012) (similar); *Home Builders Ass'n of N. Cal. v. U.S. Fish and Wildlife Serv.*, No. 05-0629, 2006 U.S. Dist. LEXIS 80255, at *66 (E.D. Cal. Nov. 2, 2006) (similar). This Court should adopt the sound reasoning of those cases and hold that FWS's decision not to exclude Unit 1 from the dusky gopher frog critical habitat designation is not reviewable because it is committed to agency discretion by law. Even if the decision not to exclude could be reviewed, FWS's decision can be reversed only if it abused its discretion. *Bennett v. Spear*, 520 U.S. 154, 172 (1997); *see Gomez-Palacios v. Holder*, 560 F.3d 354, 358 (5th Cir. 2009) (applying the "highly deferential" "abuse-of-discretion" standard). The agency's decision easily survives this deferential standard.

[7] *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262 (10th Cir. 2006); *GDF Realty*; *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *reh'g denied*, 334 F.3d 1158 (D.C. Cir. 2003) (en banc), *cert. denied,* 541 U.S. 1006 (2004); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied,* 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

will be restored and dusky gopher frogs will be reintroduced at any time in the foreseeable future—only a 'hope.' Such an unsupported hope cannot form a rational basis for regulation under the Commerce Clause." Appellants' Joint Brief at 46-47. Yet this argument reflects a misunderstanding of case law on the Commerce Clause, including the Fifth Circuit's decision in *GDF Realty* and the Supreme Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005). 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. The Court has no power to "excise individual applications of a concededly valid statutory scheme." *Gonzales*, 545 U.S. at 23.

The Fifth Circuit – as with every other circuit that has reached the issue – has found that the ESA is an "economic" regulatory scheme. *GDF Realty*, 326 F.3d at 639 (finding that the "ESA's protection of endangered species is economic in nature" because of "the 'incalculable' value of the genetic heritage that might be lost absent regulation") (citing H.R. Rep. No. 93-412, at 4); *see 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").

In addition, the ESA's critical habitat provision is "essential" to this regulatory scheme. In *GDF Realty*, the Fifth Circuit examined whether the ESA's take provision is essential to the ESA's regulatory scheme. The Court concluded that the ESA "could be undercut without the particular regulation" because of the "'critical nature of the interrelationships of plants and animals between themselves and with their environment.'" *GDF Realty*, 326 F.3d at 640 (quoting H.R. Rep. No. 93-412, at 6). The Fifth Circuit's reasoning is equally applicable to the ESA's provision for the designation of critical habitat, which are those areas "essential" for the "conservation of the species." 16 U.S.C. § 1532(5)(A); *see* 77 Fed. Reg. at 35,120 (discussing why the designation of critical habitat for the gopher frog is constitutional).

Thus, 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. Here, the case for an aggregate effect on interstate commerce is much stronger than in *GDF Realty*, in which the Fifth Circuit found a substantial aggregate effect from subterranean invertebrate species found only in Texas. Unlike the species at issue in *GDF Realty*, people travel across state lines to view the gopher frog in the wild and in captivity at the Audubon Zoo in New Orleans. *See* Declaration of Noah

Greenwald (District Court Docket No. 22-2) ¶ 7[8] (travelling from Oregon to view wild gopher frogs in Mississippi); Declaration of Casey Demoss Roberts (District Court Docket No. 22-2) ¶¶ 7-9[9] (travelling from Louisiana to view wild gopher frogs in Mississippi and viewing captive gopher frogs at the zoo in New Orleans). *Contrast GDF Realty*, 326 F.3d at 638 ("[T]here is no historic trade in the Cave Species, nor do tourists come to Texas to view them."). In addition, the gopher frog is not purely intrastate. It was historically found across three states, and FWS designated critical habitat in two states: Mississippi and Louisiana. 77 Fed. Reg. at 35,118, 35,134.

Thus, it cannot be seriously disputed that designation of critical habitat for the gopher frog has a substantial effect on interstate commerce when aggregated with the effects from all other endangered species. While the Landowners are correct that a statute can be constitutional in some applications and unconstitutional in other applications, they are wrong that the ESA is unconstitutional as applied to the frog. As the district court found, "[a]ggregating the regulation of activities that adversely modify the frog's critical habitat with the regulation of activities that affect other listed species' habitat, the designation of critical habitat by the Secretary is a constitutionally valid application of a

[8] ROA. 14-31008.2554.
[9] ROA. 14-31008.2559-60.

constitutionally valid Commerce Clause regulatory scheme." Order at 27.

Moreover, the Landowners' myopic focus on the designation of Unit 1 ignores the larger context of the regulation, which is critical in the Commerce Clause analysis. As the Fifth Circuit explained: "[T]he regulation of the Cave Species is part of a larger regulation of activity. The take provision as applied to the Cave Species is part of the take provision generally and ESA as a whole." *GDF Realty*, 326 F.3d at 638-39. It follows then that the regulation of the gopher frog is also part of a larger regulation of activity. Specifically, the critical habitat provision as applied to the gopher frog is part of the critical habitat provision generally and ESA as a whole. The Supreme Court has made clear time and time again that 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.'" *Gonzales*, 545 U.S. at 17 (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995); *Maryland v. Wirtz*, 392 U.S. 183, 196, n.27 (1968)). As such, the Court must "refuse to excise individual components of that larger scheme," *Gonzales*, 545 U.S. at 22, and conclude – as did the district court – that FWS's designation of Unit 1 is proper under the Commerce Clause.

IV. NEPA DOES NOT APPLY TO THE CRITICAL HABITAT DESIGNATION BECAUSE NO PHYSICAL ALTERATION OCCURS

Binding authority from the U.S. Supreme Court and the Fifth Circuit make

clear that NEPA does not apply to actions that do not cause a change to the physical environment. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (holding that NEPA does not apply unless the federal action at issue is "proximately related to a change in the physical environment"); *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 680 (5th Cir. 1992) (similar); *see also City of Dallas v. Hall*, 562 F.3d 712, 723 (5th Cir. 2009) (holding that NEPA analysis was not required because the "establishment of [a refuge] boundary does not effect any change in the physical environment").

The Landowners rely on a Tenth Circuit decision that applied NEPA to a critical habitat designation that – unlike here – resulted in a physical change to the environment by affecting governmental flood control efforts. *Catron Co. Bd. of Comm'rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1437-38 (10th Cir. 1996). The Tenth Circuit's decision is unpersuasive here, where the record is clear that the designation of Unit 1 will not result in any change to the physical environment. FWS cannot force the landowners to take any action to modify Unit 1. 77 Fed. Reg. at 35,128 ("Such [critical habitat] designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners."). FWS has no existing agreements with the private landowners of Unit 1 to manage the site to improve habitat for the frog, nor can any actions (such as habitat

management through prescribed burning) be implemented without the cooperation and permission of the landowners, who have made clear that they will not manage the land for the frog. *Id.* at 35,123. In any event, private action – even if made in collaboration with FWS – would not be subject to NEPA, which applies only to "major Federal actions." 42 U.S.C. § 4332(2)(C) (emphasis added). If any future federal actions to restore critical habitat were proposed, those actions could then be subject to NEPA. But the critical habitat designation by itself does not lead to any changes in the physical environment and NEPA therefore is not triggered now.

For all these reasons, this case is analogous to *Douglas County v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995), in which the Ninth Circuit held that NEPA did not apply to a critical habitat designation in part because it would not cause a change to the physical environment. The Court should follow the Ninth Circuit's persuasive reasoning, as well as binding case law from the Supreme Court and Fifth Circuit, and hold that NEPA does not apply to the gopher frog's critical habitat designation because it does not cause any change to the physical environment.

CONCLUSION

For the foregoing reasons, the Center respectfully requests that this Court affirm the district court and render judgment in its favor.

/s/ Collette Adkins Giese
Collette Adkins Giese

Attorney for Defendant Intervenor-Appellees

CERTIFICATE OF SERVICE

I, Collette L. Adkins Giese, certify that today, January 5, 2015, a copy of Brief of Intervenor-Defendants-Appellees was served either electronically or by U.S. Mail to the following:

Richard C. Stanley (La. Bar No. 8487)
STANLEY, REUTER, ROSS, THORNTON & ALFORD, LLC
909 Poydras Street, Suite 2500
New Orleans, LA 70112
Telephone: 504-523-1580
Facsimile: 504-524-0069

M. Reed Hopper
PACIFIC LEGAL FOUNDATION
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565

Edward Poitevent, II
1 Lakeway Plaza, Suite 1200
Metairie, LA 70002
Telephone: (504) 648-4109

Luther L. Hajek, Esq.
Mary Hollingsworth, Esq.
David C. Shilton, Esq.
U.S. DEPARTMENT OF JUSTICE
Ben Franklin Station
P.O. Box 7611
Washington, D.C. 20044-7611
Phone: (202) 305-0324
Fax: (202) 305-0275