UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ALABAMA

THOMAS GRAY SKIPPER, et al., Plaintiffs, v. UNITED STATES FISH AND WILDLIFE SERVICE; et al., Defendants, CENTER FOR BIOLOGICAL DIVERSITY, Defendant-Intervenor.	Case No. 1:21-CV-00094-JB-B

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

Oral Argument Requested

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MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Civ. L.R. 56, and Civ. L.R. 7, Plaintiffs Thomas Gray Skipper, HOS Timberlands, LLC, Phalyn, LLC, and Forest Landowners Association (collectively the "Landowners"), hereby move for summary judgment as to all Claims in their Complaint challenging the United States Fish and Wildlife Service's (the "Service") February 26, 2020, final rule designating critical habitat for the black pinesnake, 85 Fed. Reg. 11,238 (the "Final Rule). The Landowners are entitled to judgment as a matter of law because in designating critical habitat for the black pinesnake the Service violated the requirements of the Endangered Species Act (ESA), the Administrative Procedure Act (APA), and the Regulatory Flexibility Act (RFA). This Motion is based on the sixty-day notice of intent to sue, the Complaint, the incorporated brief in support of summary judgment, the accompanying standing declarations, and the certified administrative record. For the reasons set forth in these documents, the Court should vacate the Final Rule designating critical habitat for the black pinesnake and remand it back to the Service.

Pursuant to Civil L.R. 7(h), the Landowners respectfully request oral argument on this Motion. Oral argument would be beneficial to the Court's consideration of the significant legal issues arising under the ESA, APA, and RFA, in this case, because argument would provide the Court with an opportunity to ask the parties questions. Moreover, this Motion is based upon a lengthy and at times complex administrative record, such that a hearing may assist the Court in understanding the bases for the Landowners' Claims.

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

For generations, the Skipper family has owned and managed working timberland in Clarke County, Alabama, proudly producing high quality sawtimber and other wood products. They have been active stewards of this land, giving back to their region by conserving and enhancing habitat for native wildlife, and providing recreational opportunities for their neighbors. From 1956 to 2016, the Skippers participated in the State of Alabama's Wildlife Management Area (WMA) program, opening their land for public recreation and facilitating the state's conservation efforts. But in 2020, the United States Fish and Wildlife Service designated their property and the property of hundreds of other family forest landowners—including the Goodloe family—as critical habitat for the black pinesnake under the Endangered Species Act. This designation imposes significant regulatory burdens on these family landowners' timber operations, reduces the market value of their land, and effectively punishes their prior conservation efforts. Moreover, the Service failed to follow key statutory requirements. While the ESA authorizes the Service to designate private land as critical habitat for species, those designations are subject to judicially enforceable limits. *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018). Here, the black pinesnake critical habitat designation violates those limits for at least four reasons.

First, the Service designated large areas of private land as "occupied" based on isolated, outdated, and unreliable sightings, in violation of the ESA's requirement that critical habitat be designated on "the basis of the best scientific data available." *Id.* § 1533(b)(2). In the absence of reliable evidence of occupation, the Service failed to make the finding required under the ESA's more demanding standards for designating unoccupied lands. Second, the Service failed to adhere to the ESA's "categorical requirement" that it consider the economic costs and other impacts of a

designation. *Weyerhaeuser*, 139 S. Ct. at 371 (quoting *Bennett v. Spear*, 520 U.S. 154, 172 (1997)). Third, in declining to exclude areas from the designation on account of the significant costs imposed on private landowners, the Service violated the reasoned decision-making standards of the APA and its own stated policies. 5 U.S.C. § 706; *see* 81 Fed. Reg. 7226, 7248 (Feb. 11, 2016). Finally, the Service expressly declined to assess impacts of the designation on small entities pursuant to the requirements of the RFA. 5 U.S.C. § 601, *et seq*. Instead, it issued an erroneous and categorical certification that the Final Rule would not have a significant economic impact on a substantial number of small entities. For these reasons, this Court should grant the Landowners' Motion for Summary Judgment as to all Claims and "hold unlawful and set aside" the Service's Final Rule designating critical habitat for the black pinesnake. 5 U.S.C. § 706.

LEGAL BACKGROUND

I. Endangered Species Act

A. Listing of threatened or endangered species

Under Section 4 of the ESA, the Service (acting for the Secretary of the Interior) determines whether to list a species as "threatened" or "endangered" based on certain factors. *See* 16 U.S.C. §§ 1532(20), 1533(a). Once a species is listed as "endangered," the statute makes it an offense to "take" the species and imposes civil and criminal penalties for those who violate the "take" provision. 16 U.S.C. §§ 1533(d), 1540. "Take" is defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect . . . ." 16 U.S.C. § 1532(19). This can include habitat modification. 50 C.F.R. § 17.3. These prohibitions apply automatically to species listed as "threatened" before September 26, 2019, unless the Service has promulgated species-specific provisions pursuant to Section 4(d) of the ESA. 50 C.F.R. §§ 17.31 (wildlife), 17.71 (plants).

B. Critical habitat designation

Once the Service lists a species as threatened or endangered, Section 4 of the ESA requires the agency to designate critical habitat for that species "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3)(A). Recognizing that critical habitat designations impose serious burdens on private landowners, Congress subjected the Service's authority to a number of judicially enforceable limits. *See Weyerhaeuser*, 139 S. Ct. 361. Namely, all critical habitat designations must be based on "the best scientific data available" and the Service must consider the economic and other impacts prior to designating any area as critical habitat. 16 U.S.C. § 1533(b)(2). This requirement to consider economic and other impacts is "categorical," *Weyerhaeuser*, 139 S. Ct. at 371, and the Service must perform an economic analysis of the effects of a designation before it is finalized, *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1280 (10th Cir. 2001). After properly assessing the impacts of a proposed designation, the Service "may exclude any area" from the designation if the benefits of excluding an area outweigh the benefits of including the area in the designation, so long as the exclusion would not result in the species' extinction. 16 U.S.C. § 1533(b)(2).

Critical habitat may be either "occupied" or "unoccupied" by the species. 16 U.S.C. § 1532(5)(A). "Occupied" critical habitat is defined as "the specific areas within the geographical area occupied by the species" at the time of its listing "on which are found those physical or biological features . . . essential to the conservation of the species and . . . which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). Isolated sightings are not sufficient to demonstrate occupation. *See N.M. Farm & Livestock Bureau v. U.S. Dep't of Interior*, 952 F.3d 1216, 1226 (10th Cir. 2020); *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 916–17 (D.C. Cir. 2011). "Unoccupied" critical habitat on the other hand is defined

as the "specific areas outside the geographical area occupied by the species at the time it is listed" which are determined to be "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). The statute imposes "a more onerous procedure on the designation of unoccupied areas." *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010). The legislative history of the ESA demonstrates that Congress intended "critical habitat" to have "an extremely narrow definition." House Agreement to Conference Report on S. 2899 (Oct. 14, 1978) in A Legislative History of the Endangered Species Act of 1973, 1220–21 (U.S GPO 1982).

C. Consultation

Once the Service designates critical habitat, public or private property within that habitat is burdened with ESA regulation. Every federal agency is required to work with the Service to ensure that any action it authorizes, funds, or carries out "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). The purpose of these consultations is to determine what conditions, mitigation activities, or alternatives, may be imposed on the federal agency, permittee, or applicant. 16 U.S.C. § 1536; *see Bennett*, 520 U.S. at 157–58. In practice, the result of consultation under the ESA is almost always the imposition of additional restrictions on land use activity. *See* David Sunding, *The Economic Impacts of Critical Habitat Designation*, 6 U. Cal. Giannini Found. Agricultural and Res. Econ. Update 7 (2003).

D. Citizen Suits

The ESA provides for citizen enforcement of the statute, *see* 16 U.S.C. § 1540(g), including actions against the Secretary to limit the scope of ESA regulation. *See Bennett*, 520 U.S. at 166.

II. Regulatory Flexibility Act

Congress's concern about the impact that regulations—such as those imposed under the ESA—have on landowners and businesses, extends beyond the organic statutes authorizing such regulations. The RFA, 5 U.S.C. §§ 601, *et seq.*, was passed by Congress to minimize unnecessary impacts of federal regulations on "small entities." A "small entity" is any small business, small organization, or small governmental organization and is defined in the Small Business Act. *Id*. § 601(3), (6). Under the Small Business Act, the Administrator of the Small Business Administration (SBA) has specified detailed standards by which an entity will qualify as a "small business." 15 U.S.C. § 632(a)(2)(A). Under these standards, a timber tract operation is a small business if its gross annual revenue does not exceed $12,000,000. 13 C.F.R. § 121.201.

The RFA requires that whenever an agency publishes a general notice of proposed rulemaking, it must also "prepare and make available for public comment" an "initial regulatory flexibility analysis," describing the impact of the proposed rule on small entities. 5 U.S.C. § 603(a). The RFA also requires the agency to complete a final regulatory flexibility analysis when adopting a final rule. This analysis must include, among other things, "a description of the steps the agency has taken to minimize the significant economic impact on small entities." 5 U.S.C. § 604. These requirements apply unless the head of the agency correctly "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." *Id.* § 605(b).

The RFA provides that "any small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with the [APA]." 5 U.S.C. § 611(a). The RFA gives courts "considerable latitude" to order corrective action for an agency violation of the RFA.

N.C. Fisheries Ass'n, Inc. v. Daley, 27 F. Supp. 2d 650, 666 (E.D. Va. 1998). Appropriate remedies for violation of the RFA include vacatur and remand. *Id.*; *see also* 5 U.S.C. § 611(a)(4).

STATEMENT OF FACTS

I. Listing of the Black Pinesnake Under the Endangered Species Act

The black pinesnake is a large non-venomous, constricting snake endemic to the longleaf pine forests of the American southeast. AR000406 (Final Rule). On October 6, 2015, the Service listed the pinesnake as threatened under the ESA. 80 Fed. Reg. 60,468 (Oct. 6, 2015). Along with the listing, the Service also issued a "4(d) rule" prohibiting—among other things—incidental take resulting from "conversion of long-leaf-pine dominated forests" and "significant subsurface disturbance." *See id.* at 60,489; 50 C.F.R. § 17.42.

II. Designation of Critical Habitat

On March 11, 2015, the Service published a proposed rule to designate critical habitat for the pinesnake. AR000079. On October 11, 2018, the Service published a revised proposed rule to designate critical habitat and reopened the comment period. AR000389. Each of the Landowners (or a representative) commented in opposition to the designation.[1] On February 26, 2020, the Service published its Final Rule designating critical habitat for the pinesnake. AR000397. In total, the Service designated an area of approximately 324,679 acres in eight units in Alabama and Mississippi. AR000411. This includes approximately 93,208 acres of privately owned property, much of which is working timberland. *Id.*; AR000049. In designating critical habitat for the

[1] *See* AR000601–24 (David O'Melia Skipper Trust of 1989); AR000700–07 (FLA); AR000710–33 (George W. Skipper IV Trust of 1989); AR000735-000736 (J. Russell Goodloe, Jr, owner and manager of Phalyn, LLC); AR000774–97 (Helen O'Melia Skipper Trust of 1967); AR000814 (John Goodloe, day-to-day manager of Phalyn's operations); AR000947–70 (Richard Carmichael Skipper Trust of 1989); AR001014–15 (Helen O'Melia Skipper); AR 001065–66, AR001067–71 (Thomas Gray Skipper); AR001072–95 (Thomas Gray Skipper Trust of 1989).

pinesnake, the Service deemed each unit to have been "occupied" at the time of listing, and no area was determined to meet the stricter requirements for unoccupied critical habitat. AR000409. The Skipper family owns land in Unit 7 of the designation and the Goodloe family owns land in Unit 8 of the designation. Declaration of Thomas Gray Skipper (Skipper Decl.) ¶ 12; Declaration of John R. Goodloe III (Goodloe Decl.) ¶ 8.

A. Designation of Units 7 and 8 as "occupied"

Unit 7, located in Clarke County, Alabama, consists of 33,395 acres of privately owned timberland. AR000413. In determining that the private lands in Unit 7 were "occupied" by the pinesnake in 2015, the Service relied upon a single sighting in the preceding twenty years. AR000413. The Service otherwise relies upon four sightings in the area now comprising Unit 7, which the record describes as "anecdotal," AR001967 (Barbour 2009), and which all occurred at least twenty years prior to the pinesnake's listing, AR001252 (Duran 1998a). Each sighting occurred on the outer perimeter of the area now designated as Unit 7. AR001982 (Barbour 2009).

Unit 8, also located in Clarke County, Alabama, consists of 5,943 acres of forested land, of which 2,100 acres is privately owned. AR000413. The remaining 3,843 acres in Unit 8 consist of land within the Fred T. Stimpson Special Opportunity Area, owned by the State of Alabama. AR000413. In determining that the lands within Unit 8 were occupied in 2015, the Service relied upon two "anecdotal" sightings of the pinesnake from the 1990s, neither of which occurred on the private lands within the Unit. AR000413 (Final Rule); AR001968 (Barbour 2009). No pinesnakes have been seen in Unit 8 since 1997. AR001252 (Duran 1998a). A 2008-09 survey of the areas now comprising Units 7 and 8, designed to locate black pinesnakes, failed to locate any individuals. AR000398 (Final Rule); AR001968 (Barbour 2009).

During the rulemaking process peer reviewers and numerous public commenters argued

that there existed insufficient evidence to support the Service's assumption that Units 7 and 8 were occupied in 2015. AR000398; AR000442 (Duran Peer Review); AR000432 (Rudolph Peer Review). The Service claimed in response that occupation of the lands within Units 7 and 8 could be inferred from the presence of "suitable forested habitat." AR000398 (Final Rule).

B. Economic impacts analysis

Prior to finalizing the designation, the Service produced an analysis of the economic impacts of the proposed designation. AR000415–18 (Final Rule). In 2014 the Service issued a memorandum to Industrial Economics, a private contractor engaged by the Service. AR000005–20. The memorandum's purpose was "to provide information to serve as a basis for conducting an economic analysis for the proposed designation of critical habitat for the black pinesnake." AR000005. This "Incremental Effects Memorandum" describes the anticipated impacts of the designation, including among other things, effects to timber and forest management activities, as well as agricultural conversion, development, and construction projects. AR000014–19.

On October 22, 2014, Industrial Economics issued a Screening Memorandum along with its analysis of the economic impacts of the proposed critical habitat designation. AR000021–43. The Screening Memorandum excluded any so-called "baseline" costs purportedly attributable to "any existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users affected by the designation of critical habitat" including "the economic impacts of listing the species under the Act . . . " AR00027.

Despite excluding so-called baseline costs of regulation, the Screening Memorandum and an accompanying memorandum still estimated that the designation could lead to a significant decrease in land values. AR000038–40; AR000044–53 (Suppl. Info. on Land Values). However, these costs were not analyzed or taken into account beyond an assertion that the land was relatively

valuable prior to the designation. *Id.* Consequently, the Service did not exclude any private lands from the designation. AR000415–18 (Final Rule).

C. The Service's certification under RFA, 5 U.S.C. § 605(b)

When it published its proposed rule to designate critical habitat for the pinesnake, the Service took the position that the RFA categorically does not apply to critical habitat designations, because any impacts to small entities are insufficiently "direct." AR000095 (Proposed Rule). It therefore certified "that, if promulgated, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities." *Id*. Likewise, when it published the Final Rule, the Service did not publish a final regulatory flexibility analysis. Instead, the Service restated its categorical position that critical habitat does not directly regulate small entities. It therefore certified under 5 U.S.C. § 605(b) that its designation of 90,000 acres of private timberland would not have a "significant impact" on a "substantial number of small entities." AR000418–20 (Final Rule). The Service made its Section 605(b) certification despite dozens of comments identifying the designation's impact on small silvicultural operations and independent landowners. *See* AR000400–02; *supra* note 1.

III. This Lawsuit

By identical letters dated December 14, 2020, and December 19, 2020, the Landowners provided the Secretary of the Interior and the Director of the U.S. Fish and Wildlife Service with written notice of the violations that are the subject of this lawsuit, in accordance with 16 U.S.C. § 1540(g)(2)(C). *See* ECF No. 8-1; ECF No. 23 ¶ 7 (admitting receipt of the Landowners' 60-day notice). The Service responded to this notice by letter dated February 23, 2021. *See* ECF No. 8-2; ECF No. 23 ¶ 7 (admitting the Service responded to the Landowners' 60-day notice). In its response letter the Service takes the position that it previously considered all the issues raised in

the Landowners' letter during the notice and comment period and addressed them in the Final Rule. ECF No. 8-2. As a result of the Service's failure to take corrective action, on February 26, 2021, the Landowners filed suit. ECF No. 8.

STANDING

The Landowners have standing. The standing inquiry consists of three elements: (1) "the plaintiff must have suffered an injury in fact," (2) "the defendant must have caused that injury," and (3) "a favorable decision must be likely to redress it." *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996–97 (11th Cir. 2020) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). The Supreme Court has explained that where "the legality of government action or inaction" is being challenged "there is ordinarily little question" of standing for the "object of the action (or forgone action)." *Defs. of Wildlife*, 504 U.S. at 561–62.

The Helen O. Skipper Trust of 1967, and its successor trusts, and the Skipper Family Trusts of 1989 (each represented by Thomas Gray Skipper), own a combined 11,489 acres of working timberland which has been designated as "Unit 7" of the black pinesnake's critical habitat. Skipper Decl. ¶ 12. HOS Timberlands as the Trusts' successor in interest, is expected to receive title to all this Unit 7 land within the coming months. *Id.* ¶ 27. Phalyn, LLC, owns a 270-acre tract of working timberland within Unit 8 of the pinesnake's critical habitat. Goodloe Decl. ¶ 8. The Helen O. Skipper Trust of 1967, the Skipper Family Trusts of 1989, and Phalyn, are small entities for purposes of the RFA because they are timber tract operations with gross annual revenues not exceeding $12,000,000. *See* 13 C.F.R. § 121.201; Skipper Decl. ¶ 29; Goodloe Decl. ¶ 17.[2]

[2] As the successor-in-interest to the Helen O. Skipper Trust of 1967 and the Skipper Family Trusts of 1989, HOS Timberlands is also a small entity for purposes of the RFA because it will be a timber tract operation with gross annual revenues not exceeding $12,000,000. Skipper Decl. ¶ 29.

As the owners of land designated as critical habitat for the black pinesnake,[3] these small entities are the "objects" of the challenged government action, and therefore there is "little question" of their standing to challenge the designation. *Defs. of Wildlife*, 504 U.S. at 561–62. Each entity is directly regulated by the designation and has been injured by the designation imposing significant regulatory burdens on their property and timber operations. Most significantly, critical habitat designations immediately reduce the market value and impact the salability of designated land, due to the stigma that attaches to private land designated as critical habitat. AR000044 (Suppl. Info. on Land Values); *see also* Skipper Decl. ¶¶ 13–16; Goodloe Decl. ¶¶ 11–15; Declaration of Scott Jones (Jones Decl.) ¶¶ 18–23. This stigma arises from the public's "perception that critical habitat will preclude, limit, or slow development." AR000044 (Suppl. Info. on Land Values). Representatives of the Helen O. Skipper Trusts of 1967, the Skipper Family Trusts of 1989, and Phalyn, LLC, established during the rulemaking process that these entities own private property within Units 7 and 8. *See supra* note 1 and surrounding text. The Service has acknowledged the likelihood of immediate reductions in the market value of private property within Units 7 and 8 due to the designation leading to negative perceptional effects. AR000044–52 (Suppl. Info. on Land Values); AR000039–40 (Screening Memo). This evidence contained in the administrative record is alone sufficient to establish standing. However, representatives of each entity have also provided declaration evidence of the designation's effect in reducing the market value of their property. Skipper Decl. ¶¶ 12–16; Goodloe Decl. ¶¶ 8, 11–15. This immediate reduction in the market value of each entities' property is "concrete and particularized," "actual or imminent, not conjectural or hypothetical," *Trichell*, 964 F.3d at 996–97 (quoting *Defs. of Wildlife*,

[3] Or as the imminent recipient of such land, in the case of HOS Timberlands. Skipper Decl. ¶¶ 27–28.

504 U.S. at 560), and is sufficient to establish standing. *See Weyerhaeuser*, 139 S. Ct. at 368, n.1 (holding that a decrease in the market value of private timber property resulting from negative perceptional effects of a critical habitat designation is "sufficiently concrete for Article III purposes"). The Landowners' declarations also identifies additional direct costs the designation has imposed on each entity's day-to-day operations, including reductions in current and future revenues from their property. Skipper Decl. ¶¶ 17–22; Goodloe Decl. ¶¶ 16.

These injuries are traceable to the designation of each entity's private property as critical habitat for the black pinesnake. And these injuries would be redressed by this Court's issuing an order setting the designation aside and remanding it to the Service to conduct the rulemaking in accordance with the requirements of the ESA and RFA. *See Weyerhaeuser*, 139 S. Ct. at 368, n.1.

Forest Landowners Association (FLA) likewise has standing to sue. An organization can assert standing on its own behalf, on behalf of its members, or both. *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1159–1166 (11th Cir. 2008). An organization has standing to sue on behalf of its members when (1) "its members would otherwise have standing to sue in their own right," (2) "the interests at stake are germane to the organization's purpose," and (3) "neither the claim asserted or the relief requested requires the participation of individual members in the lawsuit." *Fla. State Conf. of N.A.A.C.P.*, 522 F.3d at 1160 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). FLA meets the test for associational standing. First, the Skippers maintain membership in FLA through the family company that manages the day-to-day timber operations on their property—Scotch Land Management, LLC. Skipper Decl. ¶ 26; Jones Decl. ¶ 17. As demonstrated above, the Skipper family entities have standing to sue in their own right. Second, by serving as an advocate for America's family forest landowners in legislative, regulatory, and judicial matters, FLA seeks to protect private forest

landowners from a variety of threats, including arbitrary and overreaching regulation, such as regulations imposed under the ESA. *Id.* ¶¶ 4–7. Therefore, the interests at stake in this litigation are germane to FLA's purposes. *Fla. State Conf. of N.A.A.C.P.*, 522 F.3d at 1160. Finally, FLA seeks only prospective relief and not monetary damages, and therefore the participation of individual members is not required. *Cf. United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553 (1996).

STANDARD OF REVIEW

A motion for summary judgment must be granted when there is no genuine issue of material fact, such that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). When summary judgment is sought in an action that is based on an administrative record the motion "serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the [APA] standard of review." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 354 F. Supp. 3d 1253, 1267 (N.D. Ala. 2018) (citing *Bloch v. Powell*, 227 F. Supp. 2d 25, 31 (D.D.C. 2002)). Agency decisions made pursuant the ESA and RFA are reviewed according to the standards of the APA. *See Weyerhaeuser*, 139 S. Ct. at 371; 5 U.S.C. § 611(a)(1). Under the APA standard of review, a reviewing court "shall hold unlawful and set aside" agency actions found to be "arbitrary, capricious, an abuse of agency discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

When reviewing the lawfulness of an administrative agency's construction of a federal statute pursuant to the APA's standard of review, a court "must give effect to the unambiguously expressed intent of Congress." *Legal Envtl. Assistance Found., Inc. v. U.S. E.P.A.*, 118 F.3d 1467, 1473 (11th Cir. 1997) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,*

467 U.S. 837, 842–43 (1984)). An agency action is arbitrary and capricious if the agency has relied on impermissible factors, failed to consider an important aspect of the problem, offered an unsubstantiated explanation for its decision, or simply failed to draw a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Nat'l Mining Ass'n v. U.S. Dept. of Labor*, 812 F.3d 843, 865 (11th Cir. 2016).

ARGUMENT AND AUTHORITY

I. The Record Does Not Support the Service's Conclusion That Units 7 and 8 Were Within the Geographical Area Occupied By the Pinesnake At the Time of Listing

Critical habitat may be either "occupied" or "unoccupied" by the species at the time of its listing, with a more demanding showing required to designate "unoccupied" critical habitat. 16 U.S.C. § 1532(5)(A); *N.M. Farm & Livestock Bureau*, 952 F.3d at 1228–29. The designation of Units 7 and 8 as "occupied" based on isolated and unreliable sightings violates the Act's requirement that critical habitat be designated on "the basis of the best scientific data available," and is arbitrary and capricious. 16 U.S.C. § 1533(b)(2).

A. Isolated sightings are inadequate as a matter of law to establish occupation

"Occupied" is not explicitly defined in the ESA,[4] and thus should be given its ordinary meaning. *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994) ("In the absence of such a definition, we construe a statutory term in accordance with its ordinary or natural meaning."). "Occupy" means to "dwell in" or to "take up or fill up (space, time, etc.)." *See Occupy*, Webster's New Twentieth

[4] The Service has defined by regulation the broader statutory phrase "geographical area occupied by the species" as "[a]n area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range)." 50 C.F.R. § 424.02. But this does not define the operative term "occupied" and instead simply reserves to the Secretary the unlimited discretion to define occupation on an ad hoc basis. No heightened deference is afforded to ad hoc agency interpretations varying according to agency decision. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993).

Century Dictionary of the English Language Unabridged (2d ed. 1977). *See also Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 344 F. Supp. 3d 355, 369 (D.D.C. 2018) (citing Merriam-Webster's dictionary and determining that the "plain meaning" of "occupy" as it is used in the ESA "means 'to take up residence in[.]'"). This ordinary meaning of "occupied" is supported by Congress's intent to pass "[a]n extremely narrow definition of critical habitat." House Agreement to Conference Report on S. 2899 (Oct. 14, 1978) *in* A Legislative History of the ESA at 1220–21. For their part, courts have held that the Service may only designate an area as occupied if the species "uses [the area] with sufficient regularity that it is likely to be present during any reasonable span of time[.]" *See N.M. Farm & Livestock Bureau*, 952 F.3d at 1226 (quoting *Ariz. Cattle Growers'*, 606 F.3d at 1165).

Courts have rejected attempts by the Service to infer occupation from isolated sightings. In *New Mexico Farm and Livestock Bureau*, the Tenth Circuit found that three isolated sightings of jaguar in the 1990s were insufficient to support the Service's conclusion that jaguar occupied those areas in the 1970s. *See N.M. Farm & Livestock Bureau*, 952 F.3d at 1226. The court rejected the Service's "speculative" conclusion that occupation of those areas could be inferred because "[j]aguars are difficult to detect due to their rarity, cryptic appearance, elusive behavior, and habitat complexity." *Id.* at 1226–27 (quoting 79 Fed. Reg. 12,572, 12,581 (March 5, 2014)). Similarly, in *Otay Mesa Property*, the D.C. Circuit rejected the Service's reliance on a single sighting in 2001 to support a determination that the San Diego fairy shrimp occupied the area at issue in 1997. *Otay Mesa Prop., L.P.*, 646 F.3d at 916–17. The court rejected as "strained" the Service's reasoning that because fairy shrimp could "leave behind buried eggs that do not hatch for months or even years," their presence in 2001 inferred presence in 1997. *Id.* at 917 (citing 62 Fed. Reg. 4925, 4926 (Feb. 3, 1997)).

The Service's conclusion that the pinesnake occupied Units 7 and 8 in 2015 is similarly "speculative." *Cf. N.M. Farm & Livestock Bureau*, 952 F.3d at 1226. The Service relies upon only a single sighting in Unit 7 in the twenty years prior to the pinesnake's listing. AR000413 (Final Rule). The Service otherwise relies upon four sightings which the record describes as "anecdotal," AR001967 (Barbour 2009), and which all occurred at least twenty years prior to the pinesnake's listing, AR001252 (Duran 1998a). Moreover, each sighting occurred on the outer perimeter of the area now designated as Unit 7. AR001982 (Barbour 2009). Documents in the record suggest it is unlikely that a pinesnake population has persisted in Unit 7 since these sightings. AR 001967 (Barbour 2009) ("if either area supports a black pine snake population, it likely would be a very small population and not sustainable long term"); *see also* AR001351 (Duran and Givens 2001) (continued existence of the pinesnake in Unit 7 "in doubt"); AR001235 (Duran 1998a) (same).

Likewise, the Service relies upon only two sightings in Unit 8. AR000413 (Final Rule). The more recent of these two sightings occurred eighteen years prior to the pinesnake's listing. AR001252 (Duran 1998a). These sightings have also been described as "anecdotal," AR001968 (Barbour 2009). A 2008-09 survey failed to locate any individual snakes in either of the areas now designated as Units 7 and 8. AR000398 (Final Rule); AR001967-68) (Barbour 2009). Unsurprisingly, numerous peer reviewers and public commenters criticized the Service's reliance on outdated sightings to infer occupancy. AR000442 (Duran Peer Review) (peer review comment questioning the methodology of using old sightings to determine occupation and suggesting these sightings are insufficient to "determine continued occurrence.");[5] AR000432 (Rudolph) (peer

[5] Mr. Duran's peer review comments are especially significant, since it is his 1998 and 2001 status studies upon which the Service relies for evidence of occupation in Units 7 and 8. *See* AR000409 (Final Rule). Mr. Duran specifically identified the evidentiary gap between his use of sightings from the 1990s for determining occupation in 1998, and the Service's using those same sightings for determining occupancy in 2015. AR000442 (Duran Peer Review).

review comment suggesting that in the absence of further discussion "2-8 records since 1990" is not sufficient to "to evaluate the probability that these units are in fact 'occupied at the time of listing.'").

This evidence cannot support a finding of occupation—under the term's plain meaning, or under any other conventional understanding of the term. There is no plausible argument that a small number of outdated, isolated, and "anecdotal" sightings support the conclusion that the pinesnake "dwell[s] in" Units 7 and 8. *See* Webster's, *supra*. And to suggest that one or two recorded observations in twenty years is sufficient evidence that the pinesnake "uses [the area] with sufficient regularity that it is likely to be present during any reasonable span of time," strains credulity. *N.M. Farm & Livestock Bureau*, 952 F.3d at 1226. Perhaps most convincingly, recent surveys of each location failed to find any specimens in 2009. AR001967–68; *see also Otay Mesa Prop.*, 646 F.3d at 917 ("The failure to observe any San Diego fairy shrimp in later surveys of plaintiffs' property is in tension with the suggestion that the property was occupied").

B. The Service unlawfully attempts to short-circuit the distinction between "occupied" and "unoccupied" critical habitat

In response to critical commenters, the Service attempted to salvage the designation by asserting that continued occupation can be inferred from the presence of "suitable forested habitat." AR000398 (Final Rule). But this reliance on mere *suitability* unlawfully short-circuits the distinction between "occupied" and "unoccupied" critical habitat and renders the requirement of the species' occupation at the time of listing meaningless. *Cf. Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1167 (the Service "may not determine that areas unused by [a species] are occupied merely because those areas are *suitable* for future occupancy" as "[s]uch a position would ignore the ESA's distinction between occupied and unoccupied areas.") (emphasis added). Evidence of Units 7 and 8 containing "suitable forested habitat" would suggest only that it should be analyzed as

unoccupied critical habitat, which requires a more exacting finding that the area is "essential" to the species' conservation. 16 U.S.C. § 1532(5)(A)(ii); *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163. The Service did not make this finding.[6]

C. Alternatively, the record does not support the Service's conclusion that the entire areas designated as Units 7 and 8 were occupied

Finally, even if one or two isolated sightings could support an "occupied" designation under the Act, the size of Units 7 and 8 are disproportionately large given that the record demonstrates that an individual snake could not have traveled across even a fraction of the area now designated. The Service cites studies estimating the mean home range area for an individual snake as between 106 acres (the mean for an adult female) and 551 acres (the mean for an adult male), with a range of 979 acres being the maximum ever recorded. AR000407 (Final Rule). Therefore, an isolated sighting of a single snake in 2015 does not support the Service's assumption that the *entire* surrounding 33,395-acre Unit 7 is occupied. This is likewise the case for Unit 8, where based on just two sightings, the Service assumed the surrounding 5,943 acres was occupied. AR000413.

Because the Service lacks substantial evidence to support its determination that Units 7 and 8 were occupied at the time of listing, its decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the ESA. 5 U.S.C. §706(2)(A); 16 U.S.C. § 1533(b)(2).

II. The Service Failed To Follow the ESA's Categorical Requirement To Take Into Consideration Economic and Other Impacts Before Designating Critical Habitat

Section 4(b)(2) of the Endangered Species Act "describes a unified process for weighing the impact of designating an area as critical habitat." *Weyerhaeuser*, 139 S. Ct. at 371 (citing 16 U.S.C. § 1533(b)(2)). "The first sentence of Section 4(b)(2) imposes a 'categorical requirement'

[6] In fact, the Service made the opposite finding. *See* AR000410 ("we determined that there was sufficient areas for conservation of the subspecies within the occupied areas . . .").

that the Secretary 'tak[e] into consideration' economic and other impacts before such a designation." *Id.* (quoting *Bennett*, 520 U.S. at 172) (alterations in original). "The second sentence authorizes the Secretary to act on his consideration by providing that he may exclude an area from critical habitat if he determines that the benefits of exclusion outweigh the benefits of designation." *Id.* In designating critical habitat for the black pinesnake, the Service failed to properly follow this process, for three reasons. First, by excluding so-called "baseline' costs, the Service violated the requirements to take into consideration *all* of the economic and other impacts of the designation, including those that may be "attributable co-extensively to other causes" such as the listing. *N.M. Cattle Growers*, 248 F.3d at 1285. Second, even assuming the Service's methodology was correct, it still failed to consider numerous costs of the designation. Third, the Service abused its discretion and acted arbitrarily and capriciously in failing to provide a reasoned basis for its decision not to exclude Units 7 and 8 from the designation.

A. The Service violated the ESA by excluding the coextensive costs of the designation

The first sentence of Section 4(b)(2) of the ESA requires the Service to designate critical habitat only "after taking 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). Despite the language of the ESA, the Service does not believe it must "conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes." *N.M. Cattle Growers*, 248 F.3d at 1285 (emphasis added). Instead, under the baseline approach, the Service believes that it can exclude costs of the critical habitat designation if those costs might also be attributable to other causes, such as listing. *See id.* at 1283; AR000027. The baseline approach generally results in a conclusion that the critical habitat designation will result in relatively minor economic impacts, as it did for the pinesnake critical

habitat designation. AR000403; 000416–17. But Section 4(b)(2) requires the Service to analyze *every* cost associated with designating critical habitat, including costs that might have multiple contributing causes. 16 U.S.C. § 1533(b)(2). The Service's baseline approach ignores this requirement and "is not in accord with the language or intent of the ESA." *N.M. Cattle Growers Ass'n*, 248 F.3d at 1285.

One of the key objectives of the 1978 amendments to the ESA, which added the economic analysis requirement, was to "increase the flexibility in balancing species protection and conservation with development projects." H.R. Rep. No. 97–567, at 10, 1982 U.S.C.C.A.N. 2807, 2809. Although the Service cannot refuse to list a species based on the economic impacts of that listing, Pub. L. No. 97–304, 96 Stat. 1411 (1982), economic impacts are to be considered in the "concurrent[]" designation of critical habitat, 16 U.S.C. § 1533(a)(3)(A)(i), (b)(2). In other words, "the critical habitat designation, with its attendant economic analysis, offers some counter-point to the listing of species without due consideration for the effects on land use and other development interests." H.R. Rep. No. 97–567, at 12, 1982 U.S.C.C.A.N. 2807, 2811–12. The Service cannot properly balance conservation with development unless it measures all of the costs of designating critical habitat, including coextensive costs. Any other approach violates the ESA's command to consider economic impacts and would severely underestimate, or completely ignore, the costs of a critical habitat designation to regulated parties.

Since the Tenth Circuit decided *New Mexico Cattle Growers*, the Service has modified its definition of what constitutes "adverse modification of critical habitat" to differentiate it from the definition of jeopardizing a listed species' continued existence. 81 Fed. Reg. 7214 (Feb. 11, 2016); 50 C.F.R. § 402.02. The Service believes that this slight change of the adverse modification definition now makes the baseline approach appropriate under the ESA. *See* 78 Fed. Reg. 53,058

(Aug. 28, 2013) (adopting baseline approach); *see also Ariz. Cattle Growers*, 606 F.3d at 1172 (upholding the baseline approach). But the Tenth Circuit's reasoning is still relevant and persuasive today because it rejected the baseline approach principally because it cannot be reconciled with the ESA's text. *See N.M. Cattle Growers*, 248 F.3d at 1283–85. To be sure, the court did note that the Service's then-regulatory definition of "adverse modification" exacerbated the concerns with the baseline approach. *Id.* at 1283–84. But that was not the essence of the problem with the Service's approach. As the Tenth Circuit underscored "Congress clearly intended that economic factors were to be considered in connection with [critical habitat designation]." *Id.* at 1284–85. The baseline approach fails to fully vindicate that intent because it excludes by design the consideration of at least one prime economic factor—coextensive costs.

B. The co-extensive approach more accurately analyzes how a critical habitat designation affects property owners

The Service's economic analysis here demonstrates the flaws with the baseline approach, and why it should consider coextensive costs of a critical habitat designation. The Service's approach to analyzing economic impacts allows the agency to bypass the ESA's requirement to meaningfully analyze the impacts of a critical habitat designation.

First, the designation here demonstrates how the baseline approach enables the Service to ignore important costs. Because the pinesnake's physical and biological features are also deemed essential to the species' life requisites, and because each critical habitat unit is designated as "occupied," the Service assumes that all actions that would constitute adverse habit modification would also result in jeopardy to the pinesnake (by virtue of its presumed presence within the critical habitat units). AR000417. Thus, the baseline approach "renders any purported economic analysis done utilizing the baseline approach virtually meaningless." *N.M. Cattle Growers Ass'n*, 248 F.3d at 1285. Even under the Service's new regulatory definition of "adverse modification of critical

habitat," the baseline approach results in the same problem the Tenth Circuit identified in *New Mexico Cattle Growers*. *See id.* When designating purportedly "occupied" habitat, the Service is able to characterize all costs as attributable to the listing, and not the designation. AR 000416–17. As such, the Service's baseline approach fails to give "effect to the congressional directive that economic impacts be considered at the time of critical habitat designation." *N.M. Cattle Growers Ass'n*, 248 F.3d at 1285.

Second, the pinesnake designation demonstrates how the baseline approach prejudices subsequent exclusion decisions against private landowners. The ESA's economic analysis requirement directs the Service to weigh the costs and benefits of designating an area as critical habitat, and to authorize the exclusion of areas that it views as too costly. 16 U.S.C. § 1533(b)(2); *see also* 81 Fed. Reg. at 7248 ("it is the nature of those [economic] impacts, not necessarily a particular threshold level, that is relevant to the Service's" exclusion determination). The baseline approach, however, often fails to give the Service a full picture of the impacts of the designation. Although the Service anticipates that the pinesnake designation will have no measurable impact on the species' conservation, *see* AR00041–42 (Screening Memo), it nevertheless proposes to designate over 324,679 acres of critical habitat for the species, of which 93,208 acres is privately owned property. AR000411. This is significant given the minimal benefits expected to flow from the designation. AR000416–17; AR00041–42 (Screening Memo). Even a small error in assessing costs could prevent the Service from reaching a correct conclusion that the costs of the designation exceed its benefits. Where the use of the baseline approach permits the Service to dramatically underestimate the economic impacts of a designation, the balancing analysis under Section 4(b)(2) is skewed in favor of the designation, even where, as here, the Service believes the designation provides little to no net-benefit to the species.

By excluding the coextensive costs of the designation, the Service did not measure the full costs in designating critical habitat for the black pinesnake, in violation of the ESA.

C. Even if the baseline approach were proper, the Service still failed to properly analyze the costs of designating critical habitat for the pinesnake

Even if the baseline approach were proper, the Service's analysis of the economic impacts of designating Units 7 and 8 fails to properly assess the costs of the designation, for at least three reasons.

First, a critical habitat designation reduces the market value of designated private property because of public perception. *See* AR000044–52 (Suppl. Info. on Land Values); AR000039–40 (Screening Memo). The Service acknowledged the probability that that the designation will affect land values, but made no attempt to analyze those costs. AR 000044–52; AR 0000–40. Instead, the Service stated that the pinesnake designation's effect on land values may be reduced by the presence of other listed species on the land. Namely the gopher tortoise, red cockaded woodpecker, and dusky gopher frog will also affect land values, minimizing the effects of the pinesnake designation. AR000417 (Final Rule); AR000039–40 (Screening Memo). But no protected populations of those other species are present in Clarke County, Alabama, where Units 7 and 8 are located. *See* AR00028–29 (Screening Memo) (confirming that Units 7 and 8 do not overlap with the red cockaded woodpecker's range or with critical habitat for the dusky gopher frog); *See* AR 003841 (BPS Survey Protocol) (confirming that the gopher tortoise is not listed under the ESA in Clarke County, Alabama). For Units 7 and 8, any decrease in land values will be solely attributable to the pinesnake designation. By failing to analyze these impacts, the Service violated Section 4(b)(2) of the ESA. *See Nat'l Mining Ass'n*, 812 F.3d at 865 ("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.'") (emphasis added); *State Farm*, 463 U.S. at 43 (an agency

rule is arbitrary if the agency "entirely failed to consider an important aspect of the problem").[7]

Second, the Screening Analysis underestimates costs to numerous projects in the area. In Unit 7 and 8, the Service designated over 35,000 acres of private land as critical habitat, notwithstanding the best available science demonstrating the pinesnake is unlikely to be present throughout the entirety of those areas. *See supra* pp. 15–19. The private lands in Units 7 and 8 are working forest, and the landowners lease their land for forestry projects. *See* AR000735–36 (J. Russell Goodloe, Jr.); AR001072–95 (Thomas Gray Skipper Trust of 1989). The 4(d) rule for the pinesnake effects timber management by prohibiting incidental take from certain forest management activities. *See* 50 C.F.R. § 17.42. By labeling all of Units 7 and 8 as "occupied," the designation of critical habitat effectively extends the 4(d) rule to areas where the species is not present. This is because prudent landowners will have to conform their conduct to the Service's assumption that the pinesnake is present throughout those areas by adjusting their forest management and harvesting practices to avoid potential heightened penalties for "knowing" violations of the Act. *See* 16 U.S.C. § 1540(a)(1). Without the critical habitat designation, these costs would only have been imposed on land where the snake is present and would not have been imposed on the property owners in Units 7 and 8.

Finally, the Service failed to recognize or analyze the designation's costs to conservation programs. The critical habitat designation makes it less likely that private landowners will maintain longleaf pine habitat and participate in voluntary conservation programs. *See* AR000704–05

[7] The Service also arbitrarily declined to analyze or apply the body of economic literature on perceptional effects, concluding it was inapplicable. AR000417 (Final Rule). Although citations to this literature are contained in record materials transmitted to the Service by Industrial Economics, AR00045–46 (citing List et al. (2006), Zabel and Paterson (2006)), this literature is not contained in the administrative record prepared by the Service, and the Service has subsequently confirmed that this literature was not directly or even indirectly considered by the Service during the rulemaking.

(comments of FLA); AR001404 (Lueck and Michael 2003) (suggesting that apprehension of ESA regulation discourages landowners from maintaining habitat); AR003833 (Ward, et al., 2018) (concluding that by infringing upon private management and imposing regulatory burdens ESA regulations lead to landowner reluctance to participate in voluntary conservation programs). Indeed, as a direct result of the proposal to designate critical habitat for the black pinesnake, the Skippers removed their land from the Scotch WMA, ending a sixty-year conservation partnership with the state of Alabama. AR000704–05. Yet, in its analysis, the Service failed to account for the costs of losing the WMA, or other costs to other conservation programs.

III. The Service Acted Arbitrarily and Abused Its Discretion in Deciding Not To Exclude Private Lands Within Units 7 and 8 from the Designation

Even accepting the Service's deficient economic analysis as accurate, the Service still abused its discretion in carrying out the second part of Section 4(b)(2)'s "unified process" for designating critical habitat. *Weyerhaeuser*, 139 S. Ct. at 371. Under that second step, the Service can exclude areas from a designation of critical habitat if the benefits of exclusion outweigh the benefits of inclusion, so long as the exclusion would not result in the species' extinction. 16 U.S.C. § 1533(b)(2). In the final rule designating critical habitat, the Service declined to exclude Unit 7 or 8 from the designation, despite both units containing large areas of private timber property, and despite stating that the designation has no measurable conservation benefit. AR000416–17 (Final Rule). In reaching this determination, the Service failed to explain its reasoning and abused its discretion.

Notwithstanding its flaws, the economic analysis demonstrates the high economic impacts of the critical habitat designation in areas where there is a large amount of private property. The Service recognizes that the pinesnake's critical habitat designation could potentially impose large costs on private land values, possibly reaching $180 million. AR 00051 (Suppl. Info. on Land

Values). Although the Service alleges that the exact costs cannot be measured even a fraction of that $180 million will significantly affect the private landowners whose land is burdened by the designation. On the other side of the equation, the Service implies that designating critical habitat offers little benefit. AR000416–17 (Final Rule); AR000041–42 (Screening Analysis). A designation that potentially imposes large costs to private landowners and offers little benefit to species is precisely the situation for which Congress provided the authority to exclude areas from critical habitat. *See* 81 Fed. Reg. at 7248 (Service's Section 4(b)(2) policy).

The Service, however, never offered a rationale that weighed the costs and benefits of excluding Units 7 and 8. Instead, the Service simply restated its economic analysis and said it was not excluding any areas from the designation based on economic impacts. *Id*. This lack of explanation is, by definition, arbitrary and capricious. *See Sierra Club v. Salazar*, 177 F. Supp. 3d 512, 532 (D.D.C. 2016) (an agency must reveal the reasoning underlying its conclusion and cannot merely insist its conclusions are supported by the record); s*ee also Judulang v. Holder*, 565 U.S. 42, 53 (2011) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

The Service's failure to weigh the costs and benefits of exclusion also violated its own stated policies. At the time of the designation, the Service stated that "it is the general practice of the Services to exclude an area when the benefits of exclusion outweigh the benefits of inclusion." 81 Fed. Reg. at 7248. It followed that practice because "it is the nature of those impacts, not necessarily a particular threshold level, that is relevant to the Services' determination." *Id.* The Service's failure to follow its own procedures and weigh the costs and benefits of excluding Units 7 and 8 was arbitrary, capricious, or an abuse of discretion. *Gonzalez v. Reno*, 212 F.3d 1338, 1349 (11th Cir. 2000) ("Agencies must respect their own procedural rules and regulations."); *see also N.M. Farm & Livestock Bureau*, 952 F.3d at 1230–31 (Agencies "are under an obligation to follow

their own regulations, *procedures, and precedents*, or provide a rational explanation for their departure." (quotations omitted)).

IV. The Service Erred as a Matter of Law by Failing To Conduct a Final Regulatory Flexibility Analysis for the Critical Habitat Designation

The Service did not publish initial or final regulatory flexibility analyses for the designation. Instead, it categorically certified that any regulation of small entities resulting from consultations under ESA section 7 will be insufficiently "direct" to justify analysis under the RFA. AR000095 (Proposed Rule); AR 000418–20 (Final Rule). The Service made its Section 605(b) certification despite dozens of comments—including those of the Landowners—identifying the designation's impact on small timber operations and independent landowners. AR000401–04 (Final Rule). The Service's analysis misstates the effects of the critical habitat designation, arbitrarily ignores several direct effects on small entities, and contradicts the plain language of the RFA.

First, the Service's certification ignores what is truly regulated by a critical habitat designation—land. *Cal. Cattlemen's Ass'n v. U.S. Fish & Wildlife Serv.*, 315 F. Supp. 3d 282, 287–88 (D.D.C. 2018) (The "ultimate impact of . . . [Section 7] consultations will be felt by small entities . . ."). A designation directly affects those individuals and businesses whose properties are encumbered by the designation and whose activities form the basis for any consultations required by Section 7. For its part, the National Marine Fisheries Service—which administers the ESA for most marine and anadromous species—acknowledges that the RFA applies to critical habitat designations. *See* 82 Fed. Reg. 39,160 (Aug. 17, 2017).

In this case, the effect of the designation falls on the Landowners whose properties must be managed in order to avoid adverse modification of the designated critical habitat. Section 7 "requires not just consultation, but consultation so that federal agencies 'insure' that federally-

authorized actions are not 'likely to . . . result in the destruction or adverse modification of [critical] habitat." *Cal. Cattlemen's Ass'n*, 315 F. Supp. 3d at 287–88 (quoting 16 U.S.C. § 1536(a)(2)) (ellipses supplied by the court). Thus, "any effects felt" by the Landowners "will be *direct*," as Section 7 ultimately requires federal agencies to "determine what the critical habitat designation requires in specific cases," on specific pieces of land. *Id*. The Landowners whose properties have been designated as pinesnake habitat, and whose future land use activities will be subject to consultation, are indisputably the "objects" of the designation's regulatory effect under Section 7. *Cf. Defs. of Wildlife*, 504 U.S. at 561.

Second, the Service's assertion that the only direct regulation resulting from the pinesnake's critical habitat designation is that imposed by the consultation requirements of Section 7, AR000418–20, is contradicted by the record. The pinesnake's designation will have direct economic consequences beyond those resulting from any consultations required by Section 7. Such costs include reduction in the value of designated land, AR000044–53, and the fact the pinesnake's "occupied" designation requires prudent landowners to conform their management to the Service's assumption that the pinesnake is present, even in areas where it may not be, *see supra* pp. 15–19. These effects are the direct effects of the pinesnake's critical habitat designation, and relevant information concerning them was before the Service. AR000044–53 (Suppl. Info. on Land Values); 001088–89 (Comments of Thomas Gray Skipper Family Trust). As such, the Service was required to consider them in its RFA analysis, and its failure to do so was arbitrary and capricious. *See N. Carolina Fisheries Ass'n, Inc. v. Daley*, 16 F. Supp. 2d 647, 652 (E.D. Va. 1997) (while an agency need not consider every possible contingency before making an RFA certification, it must at least consider the "potential effects" of information before it in the record).

Third, the Service's position is belied by a plain reading of the RFA itself. The Act does not distinguish between direct and indirect impacts, let alone provide support for the Service's narrowing of the term "direct" to the point of ignoring all economic impacts to private lands encumbered by a regulation. In fact, the SBA's guidelines for agency compliance with the RFA suggest that agencies should conduct a regulatory flexibility analysis to determine any impacts on small entities, even if the agency is not regulating those entities directly. AR000184 (*How to Comply with the RFA*).

Therefore, the Service violated the RFA and the APA by arbitrarily and erroneously certifying that the pinesnake critical habitat designation would not have "a significant economic impact on a substantial number of small entities," and by failing to perform the regulatory flexibility analyses required by Sections 603 and 604 of the RFA. "Congress [did] not intend[] for administrative agencies to circumvent the fundamental purposes of the RFA by invocation of the certification provision." *N.C. Fisheries Ass'n*, 27 F. Supp. 2d at 661. For these reasons, this Court should vacate the final rule and remand it for the Service. *Id.* at 666; 5 U.S.C. § 611(a)(4).

CONCLUSION

The Final Rule designating critical habitat for the black pinesnake is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. This Court should grant the Landowners' Motion for Summary Judgment as to all Claims and vacate the Service's final rule designating critical habitat for the black pinesnake. *See* 5 U.S.C. § 706(2)(a) (a court "shall" "hold unlawful and set aside" unlawful agency action); *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 781 F.3d 1271, 1290 (11th Cir. 2015) ("vacatur . . . is the ordinary APA remedy" (quotations omitted)).

DATED: September 1, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Charles T. Yates
CHARLES T. YATES*

**Pro Hac Vice*

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ALABAMA

THOMAS GRAY SKIPPER, et al., Plaintiffs, v. UNITED STATES FISH AND WILDLIFE SERVICE; et al., Defendants, CENTER FOR BIOLOGICAL DIVERSITY, Defendant-Intervenor.	Case No. 1:21-CV-00094-JB-B

[PROPOSED] JUDGMENT IN FAVOR OF PLAINTIFFS

For the reasons set forth in this Court's separate Opinion and Order, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that:

1. This Court declares that Defendants acted arbitrarily, capriciously, abused their discretion, or otherwise failed to act in accordance with law when they designated Units 7 and 8 as critical habitat for the black pinesnake because they failed to establish these areas were occupied at the time of the black pinesnake's listing, in violation of 16 U.S.C. § 1533(b)(2), or alternatively 5 U.S.C. § 706.

2. This Court declares that Defendants acted arbitrarily, capriciously, abused their discretion, or otherwise failed to act in accordance with law when they designated Units 7 and 8 as critical habitat for the black pinesnake because they failed to apply the proper standard for designating unoccupied critical habitat, in violation of 16 U.S.C. § 1533(b)(2), or alternatively 5 U.S.C. § 706.

3. This Court declares that Defendants acted arbitrarily, capriciously, abused their discretion, or otherwise failed to act in accordance with law when they analyzed the economic impacts of the black pinesnake's critical habitat designation using the "baseline" method, in violation of 16 U.S.C. § 1533(b)(2), or alternatively 5 U.S.C. § 706.

4. This Court declares that Defendants acted arbitrarily, capriciously, abused their discretion, or otherwise failed to act in accordance with law when they failed to analyze numerous economic impacts of the black pinesnake's critical habitat designation, in violation of 16 U.S.C. § 1533(b)(2), or alternatively 5 U.S.C. § 706.

5. This Court declares that Defendants acted arbitrarily, capriciously, abused their discretion, or otherwise failed to act in accordance with law by their failure to explain their decision not to exclude all or part of Units 7 and 8 from the black pinesnake's critical habitat designation, in violation of 16 U.S.C. § 1533(b)(2), or alternatively 5 U.S.C. § 706.

6. This Court declares that the Defendants acted unlawfully when they designated critical habitat for the black pinesnake without conducting initial and final regulatory flexibility analyses, in violation of 5 U.S.C. §§ 603 and 604, or alternatively 5 U.S.C. § 706.

7. This Court declares that on remand, the U.S. Fish and Wildlife Service cannot certify that critical habitat is categorically exempt from the requirements of 5 U.S.C. §§ 603 and 604.

8. The Final Rule designating critical habitat for the black pinesnake, 85 Fed. Reg. 11,238 (Feb 26, 2020), is vacated.

9. This matter is remanded to the United States Fish and Wildlife Service for further consideration consistent with this Court's Opinion and Order.

10. Plaintiffs are awarded attorney fees and costs pursuant to 16 U.S.C. § 1540(g)(4).

DATED this _____ day of _____, 2022.

_____
Honorable Jeffrey U. Beaverstock
United States District Court Judge

Kiren Mathews

From: efile_information@alsd.uscourts.gov
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U.S. District Court

SOUTHERN DISTRICT OF ALABAMA

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Case Name: Skipper et al v. United States Fish and Wildlife Service et al
Case Number: 1:21-cv-00094-JB-B
Filer: Forest Landowners Association
HOS Timberlands LLC
Phalyn LLC
Thomas Gray Skipper
Document Number: 47

Docket Text:
MOTION for Summary Judgment filed by All Plaintiffs. (Attachments: # (1) Text of Proposed Order [PROPOSED] JUDGMENT IN FAVOR OF PLAINTIFFS) (Yates, Charles)

1:21-cv-00094-JB-B Notice has been electronically mailed to:

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cd0ead80597bd1e7be507afba4d0c65c9ba4aafb499d46a492f853ed4e14]]
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