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INTRODUCTION

Plaintiff Otay Mesa Property (Otay) alleges that the Department of the Interior's (Department) final rule designating critical habitat for the Riverside fairy shrimp violates the Endangered Species Act (ESA). Amicus Pacific Legal Foundation (PLF) here addresses two of Otay's claims on summary judgment, supporting invalidation of the critical habitat designation. First, Otay alleges that the Department's economic impacts analysis employs a flawed methodology, which caused the Department to ignore costs that will flow from the designation. Compl. at 12. Second, Otay alleges that the Department failed to perform a required National Environmental Policy Act (NEPA) analysis for the designation, and therefore overlooked the designation's effect on the human environment. Compl. at 11.

PLF respectfully urges the Court to grant Otay's motion for summary judgment on these claims. The Department's Riverside fairy shrimp critical habitat designation violates the ESA because the Department engaged in legally insufficient economic impacts analysis, and failed to apply NEPA. The Court should set aside the designation.

ARGUMENT

I

THE DEPARTMENT MUST CONSIDER ALL ECONOMIC IMPACTS OF A CRITICAL HABITAT DESIGNATION

The ESA requires the Department to consider the economic impacts of designating any area as critical habitat. 16 U.S.C. § 1533(b)(2). The Department may determine, based on its economic impacts analysis, that the benefits of excluding certain areas from the designation outweigh the benefits of including those areas. *Id.* The question in this case is whether the Department's consideration of economic impacts may be confined only to impacts that solely result from the

critical habitat designation, or if the Department must consider *all* economic impacts flowing from the designation, including those impacts that are coextensively attributable to other actions, such as the agency's decision to list the species under the ESA. The former approach is the "baseline" approach, and the latter approach is the "coextensive" approach. The weight of authority requires the Department to apply the coextensive approach when evaluating the economic impacts of a critical habitat designation.

The Tenth Circuit in *New Mexico Cattle Growers' Association* examined the two competing approaches, and determined that the coextensive approach is the only approach the ESA allows. *N.M. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1285 (10th Cir. 2001).¹ In that case, several agriculture organizations challenged the Fish and Wildlife Service's rule designating critical habitat for the southwestern willow flycatcher. *N.M. Cattle Growers' Ass'n*, 248 F.3d at 1279-81. The groups argued that the Service designated too much critical habitat because the Service relied on the baseline approach and had therefore eliminated some economic impacts from consideration. *Id.* at 1280-81. The baseline approach resulted in overlooking some economic impacts because the Service disregarded impacts from the critical habitat designation if those impacts were also partly attributable to something else, such as the Service's decision to list the species. *Id.* at 1285. The Tenth Circuit "expressly rejected" the baseline approach, holding that any method of economic analysis that fails to account for the entirety of impacts resulting from a critical habitat designation fails to pass muster under the ESA. *Id.*

¹ *But see Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1172-74 (9th Cir. 2010) (adopting baseline approach).

This Court follows the Tenth Circuit's reasoning from *New Mexico Cattle Growers' Association*.² See *Home Builders Ass'ns of N. Cal. v. Norton*, 293 F. Supp. 2d 1, 3-4 (D.D.C. 2002) (approving a consent decree adopting the Tenth Circuit's view that the coextensive approach is required for critical habitat designations). In *Building Industry Legal Defense Foundation v. Norton*, 231 F. Supp. 2d 100, 104 (D.D.C. 2002), the government moved to vacate a critical habitat rule which had been based on the baseline approach, shortly after the Tenth Circuit issued its opinion in *New Mexico Cattle Growers' Association*. *Id.* The Court agreed with the government's assertion that it must perform a coextensive economic impacts analysis, and remanded the critical habitat designation to the Service to conduct that analysis. *Id.*

Like the *New Mexico Cattle Growers' Association* case, the Department here used the baseline approach and concluded that designating critical habitat for the Riverside fairy shrimp would not result in "disproportionate costs." 77 Fed. Reg. 72,070, 72,098 (Dec. 4, 2012). The Department therefore chose not to exclude any area from the designation. *Id.* But that conclusion is the result of the Department's flawed methodology. In the first place, the Department admits that, even under the baseline approach, the critical habitat designation would result in \$1.75 million to \$2.87 million in economic impacts over time. *Id.* Those costs, however, would be even greater if the Department had applied the coextensive approach, because the coextensive approach does not ignore any impacts that result from the designation.

Furthermore, the critical habitat rule notes that the brunt of the economic impact will occur in Units 2 and 5. *Id.* Otay's property is part of Unit 5. *Id.* at 72,091-92. While the Department admits that Otay will incur a substantial part of the costs associated with the designation, the

² *Cape Hatteras Access Preservation Alliance v. United States Department of the Interior*, 344 F. Supp. 2d 108, 131-32 (D.D.C. 2004), appears to be the only exception.

Department did not consider the true costs because it applied a mode of analysis that is designed to exclude known impacts from the calculation—impacts such as the costs associated with a required ESA consultation for development activity that requires a permit under the federal Clean Water Act. *Id.* at 72,098, 72,123; *see* 16 U.S.C. § 1536(a)(2).

Otay is rightly concerned that the baseline approach hides significant costs resulting from the Riverside fairy shrimp designation. The example of another species—the California tiger salamander—demonstrates that the choice to use the baseline or coextensive approach is consequential. The California tiger salamander is one species for which the Department has analyzed economic impacts under both the baseline and coextensive approach. Using the coextensive approach, the Department found that designating about 17,000 acres as critical habitat for the salamander would cost about \$184 million over 20 years. 70 Fed. Reg. 74,138, 74,157 (Dec. 14, 2005). Six years later, when the Department expanded the salamander habitat designation to include about 50,000 acres, the Department analyzed the economic impacts under the baseline approach and found only \$465,000 in impacts over 25 years—a huge reduction that influenced decisions about which areas should be excluded from designation. 76 Fed. Reg. 2,863, 2,868 (Jan. 18, 2011).

This Court favors the coextensive approach because it ensures that the government has a complete picture of the costs of the designation before determining whether certain areas should be excluded. *See Home Builders Ass'ns of N. Cal.*, 293 F. Supp. 2d at 4; *Building Industry Legal Def. Found.*, 231 F. Supp. 2d at 104. In contrast, the baseline approach, which the Department applied here, does not accurately report the full economic impact of the critical habitat designation, thus

tainting the Department's decision-making process. Amicus urges the Court to require the Department to reevaluate the economic impacts of the Riverside fairy shrimp critical habitat designation using the coextensive approach.

II

THE DEPARTMENT MUST UNDERTAKE NEPA ANALYSIS TO DETERMINE A CRITICAL HABITAT DESIGNATION'S EFFECT ON THE HUMAN ENVIRONMENT

Once the government determines the true costs of a critical habitat designation, it is equally important to analyze the effect of the designation on the human environment. The standard tool for performing such analysis is NEPA. This Court has required the Department to apply NEPA to critical habitat designations in past cases. *Cape Hatteras Access Preservation Alliance*, 344 F. Supp. 2d at 133-36; see *Cape Hatteras Access Preservation Alliance v. U.S. Dep't of the Interior*, 731 F. Supp. 2d 15, 34-36 (D.D.C. 2010). The Court should now require the Department to apply NEPA to the designation of critical habitat for the Riverside fairy shrimp.

NEPA establishes a national policy [to] encourage productive and enjoyable harmony between man and his environment. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (quoting 42 U.S.C. § 4321). It requires federal agencies to examine the effects of proposed federal actions and to inform the public of the environmental concerns that went into the agency's decision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Among other things, NEPA requires "to the fullest extent possible" all agencies of the federal government to prepare an environmental impact statement (EIS) for any "major federal action[] significantly affecting the quality of the human environment."³ 42 U.S.C. § 4332(2)(C).

³ An EIS must include: (1) the environmental impact of the proposed action; (2) any adverse environmental effects which cannot be avoided should the proposal be implemented; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of man's environment and

The Department states in the challenged rule that it is not required to perform NEPA analysis for the Riverside fairy shrimp critical habitat designation, based on *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995). 77 Fed. Reg. at 72,129. But the Department does not explain why it ignores *Catron County Board of Commissioners v. United States Fish and Wildlife Service*, 75 F.3d 1429, 1436 (10th Cir. 1996), in which the Tenth Circuit held that government agencies are required to apply NEPA to critical habitat designations. This Court has applied *Catron County* in prior cases, and should do so again here.

In *Catron County*, the county challenged the Service's designation of critical habitat for the spikedace and loach minnow in New Mexico because the Service did not apply NEPA to the designation. *Id.* at 1433. The county was concerned that designation of critical habitat would prevent the diversion and impoundment of water, thereby causing flood damage to county-owned property. *Id.* The Tenth Circuit held that NEPA applies to critical habitat designations for three reasons: (1) the ESA's focus on wildlife and its directive to take into account economic impacts does not displace NEPA; (2) critical habitat designations bring about real impacts (*e.g.*, flood control restrictions) that must be reviewed through the NEPA process; and (3) NEPA review furthers the goals of the ESA. *Id.* at 1436. The court determined that the designation's potential effects on the county's flood control operations warranted NEPA review because the county's concerns, "if proved, constitute a significant effect on the environment the impact of which and alternatives to which have not been adequately addressed by the ESA." *Id.* at 1438.

This Court adopted the *Catron County* logic in *Cape Hatteras Access Preservation Alliance*. 344 F. Supp. 2d at 133-36. That case involved the designation of critical habitat for the piping

the maintenance and enhancement of long-term productivity, and (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(2)(C)(i)-(v).

plover, which the plaintiffs alleged would restrict access to public beaches in North Carolina. *Id.* at 116. This Court rejected the notion that the ESA conflicts with NEPA, and determined that NEPA must apply to critical habitat designations. *Id.* at 134. The Court so held because it found that NEPA has a broader purpose than the ESA, namely, that “NEPA is concerned not with animal life but humans’ physical environment.” *Id.* at 135. In the case of the piping plover, this Court concluded that the critical habitat designation gave rise to genuine concerns about how the designation, which may benefit a wildlife species, would harm the human environment. *Id.* at 136. The Court concluded that such concerns must be evaluated through the NEPA process. *Id.*

The Department should be required to perform a NEPA analysis for the Riverside fairy shrimp critical habitat designation because the designation could impact the human environment. Specifically, the designation could diminish the viability of using Otay’s property for a recycling center and landfill, uses that are beneficial for the human environment. Otay alerted the Department to the planned recycling center, which was approved by voters in San Diego County. The Department knew about the project, but concluded that NEPA analysis would be unnecessary to determine the habitat designation’s effect on it. 77 Fed. Reg. at 72,123.

The Department’s dismissive response to Otay’s concerns about the recycling center perfectly illustrates why a NEPA analysis should be required for critical habitat designations. The Department undertook only a limited analysis of the designation’s effects on the project, based solely on the flawed baseline economic impacts analysis. The Department’s narrow review led it to conclude that the designation would not impede the project, but NEPA demands broader consideration of the relationship between the designation and its effects on the project. Indeed, NEPA would require the government to analyze whether alternative designations of critical habitat would be less intrusive on the environmentally beneficial project. *See Theodore Roosevelt Conservation P’ship v. Salazar*, 661

F.3d 66, 69 (D.C. Cir. 2011) (explaining that evaluation of all reasonable alternatives is the “heart” of EIS). Furthermore, the public would particularly benefit from a NEPA analysis because it would make transparent the potential impacts to the recycling center that will result from critical habitat designation, and would provide the public with an opportunity to comment on those impacts. *See Robertson*, 490 U.S. at 349 (explaining that EIS is essential to decision-making process because it “provides a springboard for public comment”). There is simply no reason to forgo a NEPA analysis in this case; in fact, it is difficult to see how the Department can be said to have adequately considered the ramifications of the Riverside fairy shrimp critical habitat designation in the absence of NEPA review.

CONCLUSION

For the foregoing reasons, Amicus PLF respectfully requests that the Court grant the Plaintiffs’ motion for summary judgment on the economic impacts analysis and NEPA claims.

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Respectfully submitted,

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